created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties.

F. *It is further ordered*, That respondent shall, within sixty (60) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

G. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

H. *It is further ordered*, That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions and subsidiaries.

IN THE MATTER OF

ASH GROVE CEMENT CO.*

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8785. Complaint, July 8, 1969-Decision, June 24, 1975

Order requiring a Kansas City, Mo., manufacturer and seller of lime and portland cement, among other things, to divest itself of two producers of ready mixed concrete in the Kansas City marketing area, and for a ten-year period, not to acquire, without prior Commission approval, ready mixed concrete companies whose purchases of portland cement exceed designated amounts. The Commission also decided that a third acquisition of a quarrying business was not anticompetitive.

* For appearances, see p. 969, herein.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§18 and 45, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

a. "Portland cement" includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready mixed concrete" includes all portland cement concrete which is manufactured and delivered to a purchaser in a plastic and unhardened state. Ready mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

c. "Kansas City area" consists of the counties of Cass, Clay, Jackson and Platte, Mo., and the counties of Johnson and Wyandotte, Kans.

II. ASH GROVE CEMENT CO.

2. Ash Grove Cement Co. (hereinafter "Ash Grove") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 10 Main Center, Kansas City, Mo.

3. Ash Grove is principally engaged in the manufacture and sale of lime from plants in Portland, Ore., and Springfield, Mo. and the manufacture and sale of portland cement from plants in Louisville, Neb. and Chanute, Kans. In 1966, Ash Grove had net sales of $24,514,383, net earnings of $4,445,389, and as of Dec. 31, 1966, assets of $51,260,681.

4. The Kansas City area is one of the principal markets for portland cement manufactured at Ash Grove's Chanute, Kans. plant. Ash Grove has sold portland cement in the Kansas City area since approximately 1908 and, since 1962, has operated a portland cement transfer station in Kansas City, Kans. to better serve its customers by truck in and around the Kansas City area. In 1966, Ash Grove's Chanute, Kans. plant shipped almost 2.1 million barrels of portland cement of which almost .9 million barrels were shipped to customers in the Kansas City area. Ash Grove has been one of the three leading portland cement suppliers to the Kansas City area since at least 1961.

5. At all times relevant herein, Ash Grove was engaged in selling

and shipping portland cement in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

III. FORDYCE CONCRETE, INC.

6. Fordyce Concrete, Inc. (hereinafter "Fordyce") was, prior to Nov. 8, 1966, a corporation organized and existing under the laws of the State of Kansas with its principal office located in Kansas City, Kans.

7. Since 1961, Fordyce had been engaged in the production and sale of ready mixed concrete in the Kansas City area and on Nov. 8, 1966 was operating two ready mixed concrete plants in the Kansas City area. For the fiscal year ended Jan. 31, 1966, Fordyce had sales of $2,804,068, net profit of $34,910, and as of Jan. 31, 1966, total assets of $1,259,003.

8. Fordyce has been one of the leading producers of ready mixed concrete and consumers of portland cement in the Kansas City area since its organization in 1961 and, in 1966, sold over 216,000 cubic yards of ready mixed concrete and consumed over 299,000 barrels of portland cement.

9. At all times relevant herein, Fordyce was engaged in selling and shipping ready mixed concrete and purchasing portland cement in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

IV. ACQUISITION

10. On June 1, 1964, Ash Grove purchased 5,225 shares of authorized but previously unissued share of Fordyce for $100,000 which resulted in its ownership of 50 percent of the outstanding stock of Fordyce. On Nov. 8, 1966, Ash Grove purchased the other 5,225 outstanding shares of Fordyce for $300,000, giving Ash Grove 100 percent ownership of Fordyce.

V. LEE'S SUMMIT READY-MIXED CONCRETE & MATERIALS COMPANY

11. Lee's Summit Ready-Mixed Concrete & Materials Company (hereinafter Lee's Summit) was, prior to Jan. 4, 1966, a corporation organized and existing under the laws of the State of Missouri, with its principal office located in Kansas City, Mo.

12. Since 1955, Lee's Summit had been engaged in the production and sale of ready mixed concrete in the Kansas City area and, on Jan. 4, 1966, was operating two ready mixed concrete plants in the Kansas City area. Lee's Summit was also engaged in the production and sale of

ready mixed concrete in Springfield, Mo. from about September 1963 through about May 1966. For the fiscal year ended Feb. 28, 1966, Lee's Summit had sales of $1,603,751, net profit of $21,593, and as of Feb. 28, 1966, total assets of $459,750.

13. Lee's Summit has been one of the leading producers of ready mixed concrete and consumers of portland cement in the Kansas City area since 1961 and in 1966 sold over 66,000 cubic yards of ready mixed concrete and consumed over 91,000 barrels of portland cement.

14. At all times relevant herein, Lee's Summit was engaged in selling and shipping ready mixed concrete and purchasing portland cement in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

VI. UNION QUARRIES

15. Prior to Jan. 4, 1966, Union Quarries was a division of Union Construction Company, Kansas City, Mo. The owners of Union Construction Company also owned two-thirds of the outstanding stock of Lee's Summit. Union Quarries operated rock quarrying and crushing operations at the two Kansas City area locations on which Lee's Summit also operated ready mixed concrete plants. Union Quarries also had a third Kansas City area location in Lenexa, Kans. It sold crushed stone and portland cement treated base rock in the Kansas City area from all three locations. In 1965, it consumed over 26,000 barrels of portland cement.

16. At all times relevant herein, Union Quarries was engaged in selling and shipping crushed stone and portland cement treated base rock and purchasing portland cement in interstate commerce and was engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

VII. ACQUISITION

17. On Aug. 31, 1962, Ash Grove purchased one-third of the outstanding common and preferred stock of Lee's Summit for $47,500. On Jan. 4, 1966, Ash Grove purchased the other two-thirds of the outstanding common and preferred stock of Lee's Summit for $200,000. Also, on Jan. 4, 1966, as part of the same transaction and agreement by which the Lee's Summit stock was acquired, Ash Grove purchased from six individuals, real estate, machinery, equipment and other property used in the Union Quarries quarrying business for $1,050,000. On Jan. 13, 1966, Ash Grove assigned all of the rights and obligations with regard to the assets used in the operation of Union Quarries to its

newly organized wholly-owned subsidiary, Union Quarries, Inc. a Missouri corporation, which now owns the assets.

VIII. MERGER

18. On Apr. 25, 1966, the name of Lee's Summit was changed to Summit Ready Mix Co. (hereinafter "Summit"). Ash Grove transferred the assets of Summit to Fordyce, its wholly-owned subsidiary on Dec. 20, 1966 and liquidated Summit as of Dec. 31, 1966. As of Dec. 31, 1966, Fordyce had assets of over $1,700,000 and operated four ready mixed concrete plants in the Kansas City area (two former Lee's Summit plants and two former Fordyce plants) under the trade name Fordyce-Summit.

IX. NATURE OF TRADE AND COMMERCE

19. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the manufacture of concrete and it represents about 60 percent of the material cost and over one-third of the total cost of manufacturing, distributing and selling ready mixed concrete, the only form in which concrete is sold as a commodity.

20. The portland cement industry in the United States is substantial. In 1966, there were about 50 portland cement companies in the United States operating approximately 184 plants. Total shipments of portland cement in that year amounted to approximately 390 million barrels, valued at about $1.2 billion.

21. Portland cement manufacturers sell their portland cement to consumers such as ready mixed concrete companies, concrete product manufacturers, contractors and building material dealers. On a national basis, approximately 60 percent of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete. However, in heavily populated metropolitan areas, the percentage of portland cement consumed by ready mixed concrete companies is generally higher. In general, portland cement consumers have not been integrated or affiliated with portland cement manufacturers. Each has operated independently on a vendor-vendee basis.

22. In recent years, there has been a significant trend of mergers and acquisitions by which ready mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies. Since 1959, there have been at least 40 such acquisitions.

23. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses competing portland cement

manufacturers from a segment of the market otherwise open to them and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their markets. Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions-contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

24. In the Kansas City area the trend toward vertical integration is well advanced. Four of the leading ready mixed concrete sellers and portland cement consumers in this area have become integrated with portland cement companies since 1963 through acquisition. More than 40 percent of the market for portland cement in the Kansas City area has been potentially foreclosed by vertical integration.

X. EFFECTS OF THE ACQUISITIONS

25. The effect of the acquisitions of Fordyce and Lee's Summit and their merger into one operation and the acquisition of the assets used in the operation of Union Quarries, both in themselves and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of (1) portland cement and (2) ready mixed concrete in the United States as a whole and various parts thereof, including the Kansas City area, in the following ways, among others:

a. Ash Grove's competitors have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Ash Grove's non-integrated competitors effectively to compete in the sale of portland cement and ready mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready mixed concrete, usually a decentralized, locally controlled, small business industry, has become concentrated in the hands of a relatively few manufacturers of portland cement.

XI. VIOLATIONS CHARGED

26. The acquisitions by Ash Grove of Fordyce and Lee's Summit and their merger into one operation constitute separately and collectively violations of Section 7 of the Clayton Act, as amended, and the acquisition of the assets used in the operation of Union Quarries constitutes a violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ADMINISTRATIVE LAW JUDGE ANDREW C. GOODHOPE

SEPTEMBER 23, 1974

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on July 8, 1969, issued its complaint in this proceeding charging Ash Grove Cement Company ("Ash Grove"), a corporation, with having violated Section 7 of the Clayton Act, as amended (15 U.S.C. §18), by its acquisition of Lee's Summit Ready-Mixed Concrete & Materials Company ("Lee's Summit"), and Fordyce Concrete, Inc. ("Fordyce"). The complaint further charged Ash Grove with violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. §45), by its acquisition of certain assets from individuals, which assets were formerly a division of Union Construction Company of Kansas City, Mo. The complaint was duly served on respondent Ash Grove and respondent appeared by its counsel and filed an answer admitting certain of the allegations of the complaint by denying that it had violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Extensive hearings were thereafter held, at which time testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. At the close of all the evidence and pursuant to leave granted by the administrative law judge, proposed findings of fact, conclusions of law, briefs and proposed orders were filed by counsel supporting the complaint and counsel for the respondent.

Proposed findings not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters. Having reviewed the entire record in this proceeding, including the proposed findings and briefs, the administrative law judge, based upon the entire record, makes the following:

FINDINGS OF FACT[1]

THE RESPONDENT

1. Ash Grove Cement Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 10 Main Center, Kansas City, Mo.

2. Ash Grove is principally engaged in the manufacture and sale of lime from plants in Portland, Ore., and Springfield, Mo., and the manufacture and sale of portland cement from plants in Louisville,

[1] The essential jurisdictional facts and facts concerning the various acquisitions were alleged in the complaint and admitted in respondent's answer.

Nebr., and Chanute, Kans. In 1966, Ash Grove had net sales of $24,514,383, net earnings of $4,445,389 and as of Dec. 31, 1966, assets of $51,260,681.

3. At all times relevant herein, Ash Grove was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

Fordyce Concrete, Inc.

4. On June 1, 1964, Ash Grove purchased 5,225 shares of authorized but previously unissued shares of Fordyce for $100,000 which resulted in its ownership of 50 percent of the outstanding stock of Fordyce. On Nov. 8, 1966, Ash Grove purchased the other 5,225 outstanding shares of Fordyce for $300,000 giving Ash Grove 100 percent ownership of Fordyce.

5. Prior to Nov. 8, 1966, Fordyce was a corporation organized and existing under the laws of the State of Kansas, with its principal office located in Kansas City, Kans.

6. Since 1961, Fordyce had been engaged in the production and sale of ready mixed concrete in the Kansas City metropolitan area ("KCMA") and on Nov. 8, 1966 was operating two ready mixed concrete plants there. For the fiscal year ended Jan. 31, 1966, Fordyce had sales of $2,804,068, net profit of $34,910 and as of Jan. 31, 1966, total assets of $1,259,003.

7. At all times relevant herein, Fordyce was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

Lee's Summit Ready-Mixed Concrete & Materials Company

8. On Aug. 31, 1962, Ash Grove purchased one-third of the outstanding common and preferred stock of Lee's Summit for $447,500. On Jan. 4, 1966, Ash Grove purchased the other two-thirds of the outstanding common and preferred stock of Lee's Summit for $200,000.

9. Lee's Summit was, prior to Jan. 4, 1966, a corporation organized and existing under the laws of the State of Missouri, with its principal office located in Kansas City, Mo.

10. Since 1955, Lee's Summit had been engaged in the production and sale of ready mixed concrete in the KCMA and on Jan. 4, 1966, was operating two ready mixed concrete plants there. Lee's Summit was also engaged in the production and sale of ready mixed concrete in Springfield, Mo., from about September 1963 through about May 1966. For the fiscal year ended Feb. 28, 1966, Lee's Summit had sales of $1,603,751, net profit of $21,593 and total assets of $459,750.

11. At all times relevant herein, Lee's Summit was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

12. On Apr. 25, 1966, the name of Lee's Summit was changed to Summit Ready Mix Co. (hereafter "Summit"). Ash Grove transferred

the assets of Summit to Fordyce, its wholly-owned subsidiary, on Dec. 20, 1966, and liquidated Summit as of Dec. 31, 1966. As of Dec. 31, 1966, Fordyce had assets of over $1,700,000 and operated four ready mixed concrete plants in the KCMA (two former Lee's Summit plants and two former Fordyce plants) under the trade name Fordyce-Summit.

Union Quarries

13. On Jan. 4, 1966, as part of the same transaction and agreement by which the Lee's Summit stock was acquired, Ash Grove purchased from six individuals, real estate, machinery, equipment and other property used in the Union Quarries quarrying business for $1,050,000. On Jan. 13, 1966, Ash Grove assigned all of the rights and obligations with regard to the assets used in the operation of Union Quarries to its newly organized wholly-owned subsidiary, Union Quarries, Inc., a Missouri corporation, which now owns the assets.

14. Prior to Jan. 4, 1966, Union Quarries was a division of Union Construction Company, Kansas City, Mo. The owners of Union Construction Company also owned two-thirds of the outstanding stock of Lee's Summit.

15. Union Quarries operated rock quarrying and crushing operations at the two Kansas City locations on which Lee's Summit operated ready mixed concrete plants. Union Quarries also had a third Kansas City area location in Lenexa, Kans. It sold crushed stone and portland cement treated base rock in the Kansas City area from all three locations. In 1965, it consumed over 26,000 barrels of portland cement.

16. At all times relevant herein, Union Quarries was engaged in commerce as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

Lines of Commerce

17. The complaint alleges that the effect of the acquisitions of Fordyce and Lee's Summit and the acquisition of the assets of Union Quarries may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale in two lines of commerce: (1) portland cement and (2) ready mixed concrete. The respondent denies this allegation.

18. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the manufacture of concrete and is the most predominant cement manufactured in the United States (Admitted, Ans. Para. 19; CX 98).

19. The portland cement industry in the United States is substantial. In 1966, there were about 50 portland cement companies in this country operating approximately 184 plants. Total shipments of portland cement in that year amounted to approximately 390 million

barrels, valued at about $1.2 billion (CX 46, 47, 49, 50, 51, 52, 53, 54, 55 and 68).

20. Portland cement manufacturers sell their product to consumers such as ready mixed concrete companies, concrete product manufacturers, contractors, and building material dealers (Admitted, Ans. Para. 21).

21. On a national basis, approximately 60 percent of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete. However, in heavily populated metropolitan areas, the percentage of portland cement consumed by ready mixed concrete companies is generally higher (CX 49, Table 16; 50, Table 17; 51 and 52, Table 15; 53 and 55, Table 14, and 94).

22. In general, portland cement consumers have not been integrated or affiliated with portland cement manufacturers. Each has operated independently on a vendor-vendee basis (CX 99; Tr. 1640-43, 2549).

23. During the late 1950's and into the 1960's, there has been a significant trend of mergers and acquisitions by which ready mixed concrete companies in various markets throughout the United States have become integrated with portland cement companies. Since 1959, there have been at least 40 such acquisitions (CX 74).

24. Portland cement is a homogenous product manufactured to standard specifications of the American Society for Testing Materials (ASTM). Generally, the product of one manufacturer is physically substitutable for the product of another (Tr. 2103, 2112, 2208, 2308-09, 2365, 2472, 2627; CX 39C, CX 54, p. 3). There are five basic types of portland cement included in the ASTM specifications. While these five types are used by concrete manufacturers, Types I and II are the most predominantly produced and used, accounting for more than 90 percent of the sales of portland cement (Table 4 of CX 49 and 50; Table 3 of CX 51, 52, 53 and 55; Tr. 2105-06, 2203-04). The same manufacturing process and raw materials are used in producing Types I through V of portland cement. Differences in types occur in the composition of the raw materials, burning temperature, and the fineness of grinding (CX 54, p. 3; 41Q; Tr. 2105-07, 2181, 2203-05, 2270, 2308, 2365).

25. During the 1960's, portland cement was sold in units of sacks representing 94 pounds and barrels representing four sacks or 376 pounds. The majority of portland cement was shipped in bulk (CX 41 0, 54, pp. 4 and 13; Tr. 2119-20, 2205, 2458).

26. Portland cement is a hydraulic cement which means it will harden under water. However, it is distinguishable in its characteristics and uses from other hydraulic cements such as masonry and natural cements. Masonry cement has a portland cement base but it is not a

portland cement. Masonry cement is used to lay bricks or block. Masonry cement is usually shipped in sacks rather than bulk and a barrel of it weighs 280 pounds compared to a barrel of portland cement which weighs 376 pounds. Masonry cement has different customers and prices than portland cement (CX 54, p. 4; Tr. 2107-08, 2205).

27. Portland cement is manufactured from raw materials such as limestone, clay, shale and alumina, which are combined, burned and ground with gypsum to an extreme fineness (CX 54, p. 3; CX 41E; Tr. 2103-04, 2202).

28. The portland cement industry is a highly capital intensive industry (Tr. 2627, 2112-13). In addition to requiring large amounts of raw materials, a portland cement plant needs large blending tanks, loading and conveying facilities, primary and secondary crushers, kilns, finished grinding equipment and various shipping devices. Only portland cement and subtypes have been made with this specialized equipment (CX 41; Tr. 2112-13, 2209). Due to the high fixed costs experienced by the industry, a plant must be operated at high levels of capacity in order to reduce unit costs sufficiently to break even or make a profit (Tr. 2143, 2240-41, 2315, 2627). During the period 1961-68, if a plant was only selling at 50 percent of its capacity, it would not be running profitably (Tr. 2173, 2240-41, 2263, 2419). A plant would have had to be producing at 85-90 percent of its capacity to make a profit at that time (Tr. 2144). In addition to the large investment in equipment, a new plant faces preoperating costs. There is an initial startup period during which costs are high and profits are not expected. It was not unusual in the portland cement industry for a new plant to experience a startup period of 2 or 3 years before achieving profitability (Tr. 2311-12, 2360).

29. Ready mixed concrete producers have been the most important purchasers in terms of regularity and quantity of purchases (CX 18I, 39D; Tr. 2113, 2115-16, 2209-10, 2312-13, 2365-67). Although heavy contractors are large purchasers of cement, their purchases were more seasonal, sporadic and geographically dispersed than those of the ready mixers (Tr. 2161-62, 2192, 2366).

30. The principal use of portland cement is in the manufacture of concrete; it has no utility by itself (CX 41E, 54, p. 6; Tr. 2104, 2202, 2602). There is no practical substitute for portland cement in the manufacture of concrete (CX 38G, 54, p. 7; Tr. 2104, 2202-03, 2445, 2502; Stipulation re Shaw and Davis, Tr. 2514-15, 2602).

31. In the sale of their product, manufacturers of portland cement consider their competitors to be other manufacturers of portland cement (Tr. 2113, 2367, 2210, 2313). On construction projects, owners, architects and engineers determine what materials will be used. It is

only after that determination is made that contractors, who actually purchase the materials, will solicit bids from the suppliers of the materials specified (Tr. 2113-14). The primary functions of the sales organizations of portland cement manufacturers were the promotion and sale of portland cement. Although salesmen of some manufacturers sold both portland and masonry cements, Universal Atlas, for example, separated portland cement from other cements by organizing two sales departments (Tr. 2118, 2214, 2264, 2369-70, 2390).

32. The price of portland cement was determined on the basis of the value at the mill (mill base) plus freight cost to destination. A manufacturer would determine his price in relation to prices charged by competing portland cement producers in a particular market. If his mill was farther away from the market than that of a competitor but his mill base was the same, he would have to absorb freight in order to remain competitive. Prices were thus determined without reference to the prices of other products (Tr. 2119-20, 2370, 2391-92, 2220). In addition, the lowering of cement prices would not increase the total demand for that product over other products because the demand for cement is derived from the level of construction activity generally and is inelastic (Tr. 2281, 2606).

33. Portland cement is a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended, and a relevant product market for purposes of Section 5 of the Federal Trade Commission Act. This conclusionary finding is in accord with previous Commission and court decisions to the same effect, which are, of course, binding on the administrative law judge. *Permanente Cement Company*, 67 F.T.C. 334 (1965); *Diamond Alkali Co.*, 72 F.T.C. 700 (1967); *U.S. Steel Corp.*, 74 F.T.C. 1270 (1968), *rev'd* on other grounds, 426 F.2d 592 (6th Cir. 1970); *Mississippi River Fuel Corp.*, 75 F.T.C. 813 (1969), *affirmed*, 454 F.2d 1083 (8th Cir. 1972); *Missouri Portland Cement Co.*, [1967-1970 Transfer Binder] Trade Reg. Rep. Paragraph 18,805 (1969) [76 F.T.C. 1064]; *Marquette Cement Manufacturing Co.*, 75 F.T.C. 32 (1969); *OKC Corp.*, 77 F.T.C. 1342 (1970), *affirmed*, 455 F.2d 1159 (10th Cir. 1972). There is nothing in the arguments to the contrary of respondent which indicate that a reversal of these decisions should be made at this time.

34. Ready mixed concrete is a material produced by combining portland cement, aggregates such as rock and sand, water, and occasionally certain admixtures (CX 38F; Tr. 2441, 2502; Stipulation re Shaw and Davis, Tr. 2514-15). Of these essential raw materials, portland cement is the most expensive and no other cement is considered to be a practical substitute (CX 38G; CX 54, p. 7; Tr. 2445, 2502; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 2602). Portland

cement represents approximately 60 percent of the raw material cost and 35 percent of the total cost of producing, distributing, and selling ready mixed concrete (Tr. 2446-47, 2502; Stipulation re Shaw and Davis, Tr. 2514-15). Coarse aggregate is the second most costly raw material in ready mixed concrete accounting for 25 percent of the raw material cost (Tr. 2447, 2502; Stipulation re Shaw and Davis, Tr. 2514-15).

35. There are three methods by which ready mixed concrete can be produced. In a central-mix operation all the raw materials are completely mixed at the plant, and the concrete, which is ready to be poured at the time it is loaded into the hauling vehicles, is then transported to the point of usage. In a transit-mix operation, the dry ingredients are measured and loaded into the hauling vehicles. Water is added on the way to the job site. Shrink-mixing is the process by which the ingredients are partially mixed at the plant and further mixed at the point of usage (CX 38F, CX 43, p. 32D-2; Tr. 2441-42). The ready mixed concrete produced by any of these methods is delivered to purchasers in a plastic, unhardened state (CX 38Z2; Tr. 2441, 2446, 2517).

36. The equipment used to produce ready mixed concrete consists of conveyors, bins, scale hoppers, and trucks equipped with revolving drum bodies to mix and haul the concrete. This equipment is specialized and cannot readily be used for any purpose other than the production and distribution of ready mixed concrete (CX 38F-G; Tr. 2442-43; Stipulation re Shaw and Davis, Tr. 2514-15).

37. Producers of ready mixed concrete generally do not manufacture and sell any other products (CX 38D, CX 43, p. 32D-2; Tr. 2441, 2501, 2516; Stipulation re Shaw and Davis, Tr. 2514-15).

38. Ready mixed concrete is produced to meet specifications which require the concrete to withstand certain pounds of pressure per square inch. These different pressure levels are known as "strengths." The strength is increased usually by increasing the amount of portland cement per cubic yard of ready mixed concrete to be produced, and reducing the amount of water and/or aggregate. Increased strengths of concrete require the use of increased quantities of portland cement resulting in higher production costs and sales prices. (CX 38I, J; Tr. 2448, 2455-58; Stipulation re Shaw and Davis, Tr. 2514-15, 1862, 1758, 1834).

39. Ready mixed concrete is sold principally to contractors or subcontractors for use in the construction of commercial buildings, schools, residential structures, foundations, sidewalks, bridges and roads. After the concrete is delivered to the job site, the contractor or builder is responsible for putting it in place (CX 38W; Tr. 2449, 2503, 1682, 1730, 1732; Stipulation re Shaw and Davis, Tr. 2514-15).

40. On sizeable construction projects, architects and structural engineers, together with the owners, determine which building material will be used and the specifications are submitted to general contractors for bids. The general contractor in turn receives bids from suppliers of the designated materials. Where the use of concrete is specified, only ready mixed concrete companies will compete for that portion of the project. Whenever concrete was required on any project in the KCMA, contractors and builders obtained their concrete almost entirely from ready mixed concrete producers (CX 38W, X; Tr. 2451-52, 2454; Stipulation re Shaw and Davis, Tr. 2514-15, 1728-30, 1887, 1773).

41. In the KCMA, all ready mixed concrete producers competed with each other for both commercial and residential jobs with the exception of very large construction pours which could be handled only by the larger multiplant companies (Tr. 2449-51, 2485-86, 2503, 2510, 2574, 1682, 1735, 1916-23, 1862-63, 1884). However, when identifying their suppliers, contractors specified both small and large concrete companies (Tr. 1818-20, 1937-41, 1863-67). Furthermore, small ready mixed concrete producers considered themselves to be in competition with the larger companies (Tr. 2504-05, 2522, 2548, 1906-07, 1922-23).

42. Producers of ready mixed concrete are not influenced in their determination of prices to be charged for their product by price changes of other building materials (Tr. 1755, 1856).

43. Ready mixed concrete companies have standard day-to-day prices which usually apply to their smaller classifications of jobs. On most other jobs, ready mixed concrete is generally priced on an individual quotation basis. The price quoted by producers is influenced by the cost of materials, the specifications of the job, the size of the job, the distance from producing plants and the expected price of competitors (Tr. 2452, 2456, 2462-63; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 1700, 1710-12, 1728-32).

44. Ready mixed concrete producers in the KCMA produce concrete of equal quality. Price is the primary basis of competition between them and is the principal determinative factor in the sale of ready mixed concrete. During 1961-1968, a price differential of 25 cents or less per yard could have caused a customer to switch suppliers (CX 38Z3-4; Tr. 2458-60; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 1712, 1936, 1822, 1862, 1879, 1753, 1758).

45. Other factors which may influence the selection of a concrete supplier are the ability to provide good service, prompt delivery, terms of payment offered and business relationships (CX 38Z4; Tr. 2453, 2458-60; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 1753, 1937, 1942).

46. Producers of ready mixed concrete considered themselves

members of the ready mixed concrete industry. Ready mixed concrete producers in the KCMA formed a trade association (Tr. 2463; Stipulation re Shaw and Davis, Tr. 2514-15).

47. The Bureau of the Census of the U.S. Department of Commerce has recognized ready mixed concrete as a separate and distinct industry and has assigned it a separate Standard Industrial Classification code (CX 43 and 99).

48. Ready mixed concrete is a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended, and a relevant product market for purposes of Section 5 of the Federal Trade Commission Act. This conclusionary finding is also supported by the various Commission and court cases cited above in Finding 33. The respondent makes several arguments to the effect that the larger multiplant ready mixed companies do not compete with smaller single plant operations. It is true that the multiplant operations get the bigger jobs; however, there is ample evidence of competition among all ready mixed companies requiring that such argument be rejected. Respondent presents nothing else that would cast any doubt upon the prior Commission and court decisions involving this same line of commerce.

Section of the Country

49. The complaint alleges that the effects of the merger "may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of (1) portland cement and (2) ready mixed concrete in the United States as a whole and various parts thereof, including the Kansas City area, * * *" The evidence, however, was primarily directed to establishing the effects in the Kansas City area. The Kansas City area was defined in the complaint as consisting "of the Counties of Cass, Clay, Jackson and Platte, Mo., and the Counties of Johnson and Wyandotte, Kans." Respondent urges that the six counties surrounding Kansas City, Mo., and Kansas City, Kans., are not a realistic market area within which to measure the effects of the merger upon the sale of either portland cement or ready mixed concrete.

50. Portland cement is not generally shipped more than 300 miles from the location of the mill in which it is produced, except where water transportation is available. Consequently, the geographic markets served are limited because of portland cement's high shipping cost in relation to its low product value and high product weight (CX 54, pp. 12, 13; Tr. 2120-22, 2150, 2158, 2164-65). Metropolitan markets have been recognized as important markets for the distribution of portland cement because of the concentration of population and the resulting construction activity and the continuous portland cement demand and consumption. These metropolitan markets include such

cities as Kansas City; Topeka, Kans.; Lincoln and Omaha, Nebr.; Oklahoma City and Tulsa, Okla. (CX 96C, 39E; Tr. 2122-24, 2317-22).

51. Metropolitan markets differ since the various producing companies shipping portland cement into the various markets will differ depending upon the location of their plant and prices vary from one metropolitan market to another. Competing suppliers of portland cement must offer timely delivery of their products since ready mixed concrete producers, the most important class of portland cement customers, have limited storage facilities. Unless a mill is within a metropolitan area, such as Kansas City or located nearby, it will generally have a distribution terminal to which the portland cement is shipped and then reshipped to the customer promptly upon the receipt of orders (Tr. 2122-23, 2228-29, 2322-23, 2392-94, 2191-92, 2126-27, 2317-18, 2396).

52. The Kansas City marketing area (KCMA) as defined in the complaint consumed substantial quantities of the shipments made by those competitors which had mills or terminals located within it. In 1965, 49.4 percent of all shipments made by the Sugar Creek, Mo., mill of Missouri Portland Cement Company were made to destinations located within the KCMA. In the same year, 31.6 percent of all shipments made by the Bonner Springs, Kans., mill of Lone Star Cement Corporation were made to customers located within the KCMA. In 1965, respondent, Universal Atlas Cement Division of U.S. Steel, General Portland Cement Company and Mississippi River Corporation, each operated a distribution terminal within the KCMA. In that year, 86.7 percent, and in 1966, 79.9 percent of all shipments from the terminals were made to destinations located within the KCMA. In 1965, 69.5 percent and in 1966, 72.0 percent of all portland cement shipments to all destinations located within the KCMA were made from the Kansas City area mills of Missouri Portland Cement Company and Lone Star Cement Corporation and the Kansas City area terminals of respondent, Universal Atlas Cement Division of U.S. Steel, General Portland Cement Company and Mississippi River Corporation (CX 77, 78, 80; Tr. 2677, 3135, 3253).

53. In 1961, eight companies shipped portland cement to customers located within the Kansas City area. In 1966, these same eight companies and two new entrants were the only companies shipping portland cement to destinations located within the Kansas City area and were the only practicable sources of supply for portland cement recognized by consumers in that area (CX 79, 80; Tr. 2473; Stipulation re Shaw and Davis, Tr. 2514-15).

54. Respondent served the Kansas City area from a mill located at Chanute, Kans., and from a terminal located within the KCMA. In 1965,

6.7 percent of all shipments from respondent's Chanute, Kans., mill were made directly to Kansas City area destinations. In the same year, 87.5 percent of all shipments from respondent's Kansas City, Kans., terminal were made to destinations within the Kansas City area (CX 2C, 6B, 8L, 17H, 18G, 77, 78; Tr. 1625).

55. The Kansas City area was an important portland cement market, consuming 17.3 percent of all shipments by the mills and terminals of the companies serving that area in 1965. The KCMA was defined by portland cement suppliers as the densely populated area surrounding Kansas City (CX 39E, 77, 78, 94; Tr. 959-61, 1625, 2169, 2221-22, 2322, 2373).

56. Prior to the acquisition of Fordyce, Lee's Summit and Union Quarries, respondent recognized a trend towards vertical integration to be occurring within the Kansas City area (CX 18B, 39Q).

57. Respondent considered the KCMA market area, as defined in the complaint, as an important market and outlet for its portland cement production (CX 39E, 96C; Tr. 1648, 1650, 3185, 3268).

58. The Kansas City area, as defined in the complaint, is an appropriate and relevant section of the country within the meaning of Section 7 of the Clayton Act, as amended, in which the effects of the challenged acquisitions in the manufacture and sale of portland cement may be determined, and is an appropriate market for purposes of Section 5 of the Federal Trade Commission Act.

59. The effective marketing area for ready mixed concrete produced from plants within the KCMA vary, but generally do not exceed 25 miles of the producing plant and nearly all of the ready mixed concrete produced by competitors within the KCMA was sold to customers also located within that area. This market is limited by the perishability of the product, transportation costs, delivery time, licensing restrictions, radio communications with delivery units, and service requirements of customers (CX 38Q-R, T, S; Tr. 1753, 1709, 1785, 2502-03, 2517-22, 2542).

60. Some producers of ready mixed concrete located within the KCMA utilized more than one plant so as to get better coverage of the metropolitan area. These producers all identified their competitors as those other producers of ready mixed concrete also located in the KCMA and all producers competed with one another on the basis of price, quality and service (Tr. 1710-12, 2521-22, 2548-49, 2484-85, 2517-18, 2543).

61. The prices at which ready mixed concrete was sold within the Kansas City area are different than the prices in other market areas and were highly competitive and uniformly depressed during the period 1961 to 1965 (Tr. 1623, 1720-21, 1755, 2550-51). During 1965, the

producers of ready mixed concrete within the KCMA consumed 73.5 percent of all portland cement shipped into the area (CX 94).

62. Prior to their acquisitions, Fordyce and Lee's Summit were major competitors in the ready mixed concrete market in the KCMA and Union Quarries sold aggregates in the KCMA and was one of the largest suppliers of aggregates in the area (CX 8P, R, 17C, 37C, 37E, 103).

63. The respondent recognized Kansas City as a separate and distinct market when it purchased Fordyce and Lee's Summit and included in the purchase agreements covenants not to compete within 20 or 30 miles of the Kansas City, Mo., City Hall (CX 23D, G, 32Q and 20C).

64. The Kansas City area, as defined in the complaint, is an appropriate and relevant section of the country within the meaning of Section 7 of the Clayton Act, as amended, in which the effects of the challenged acquisitions in the manufacture and sale of ready mixed concrete may be determined and is an appropriate market for purposes of Section 5 of the Federal Trade Commission Act.

65. Respondent urges that there are other much wider areas which should be included in any attempt to measure the effects of the acquisition insofar as the sale of portland cement is concerned. The thrust of respondent's argument is principally that the suppliers of portland cement to the Kansas City area sell to a much larger area than just Kansas City and that the effect upon competition must be measured through the entire areas of any of the competing cement producers who ship cement. Respondent first starts with a 23-State area into which the various companies supplying Kansas City ship, then reduce this to a 15-State area and then to a 6-State area which include the six contiguous States closest to the Kansas City area and finally to a 2-State, Kansas-Missouri, market (Resp. Prop. Finds. 285, 286, 288, 293). The argument is that the shipments made to the Kansas City area are so small when compared with shipments made to the larger areas that the Kansas City shipments must be considered insignificant or *de minimis*.

66. In the first place, the Commission has had occasion to judge the relevant market for portland cement in several prior cases. In each of these, the finding has been that metropolitan areas are distinct and well-defined local markets within broader geographic markets, and are the relevant markets for the purpose of measuring the effects of an acquisition by portland cement producers of ready mixed concrete producers. *Marquette Cement Manufacturing Company, supra; Mississippi River Fuel Corp., supra; U.S. Steel Corp., supra;* and *OKC Corp., supra.* On appeal, the Sixth Circuit upheld the Commission's

determination in Docket 8655, *U.S. Steel Corp.*, in which the New York metropolitan area was found to be a relevant geographic market for the sale not only of portland cement, but also of ready mixed concrete. *U.S. Steel Corp.* v. *Federal Trade Commission*, 426 F.2d 592, 596 (6th Cir. 1970). Additionally, in *Diamond Alkali Company*, Docket 8572, 72 F.T.C. 700, 716 (1964), the hearing examiner found that a metropolitan area was "probably the most important single local market," within a well-defined broader market area consisting of 23 counties.

67. In the *Mississippi River Corp.* case, *supra*, both the Commission and the Eighth Circuit Court of Appeals found that the metropolitan areas of Kansas City, Cincinnati and Memphis comprised relevant areas in which to measure the competitive effects of the acquisition for both portland cement and ready mixed concrete. An identical finding was made in the *OKC Corp.* case, *supra*, when it was found that the New Orleans metropolitan area was a relevant submarket within which to measure the effects of the merger. A similar holding was made in the *U.S. Steel Corp.* case, *supra*, which found that the New York metropolitan area constituted a relevant submarket which was approved by the Sixth Circuit Court of Appeals. Consequently, respondent's contentions that the Kansas City area is not an appropriate market are rejected.

Effects of the Acquisitions Portland Cement

68. During the period 1961 to 1966, the majority of shipment of portland cement in the KCMA by Ash Grove, as well as other portland cement suppliers, were made to ready mixed concrete companies. Ash Grove's shipments to ready mixed concrete companies during that period of time were between 72.8 percent and 82.2 percent of its total shipments in the KCMA market (CX 94).

69. In 1961, the KCMA was served by eight portland cement companies all directly from their plants. In 1962, Ash Grove and General Portland established distribution terminals within the KCMA. In 1963, OKC Corp. entered as the ninth supplier to that area. Universal Atlas established a transfer station in the KCMA during 1964. Mississippi River became the tenth portland cement supplier to the KCMA in 1965 and established a distribution terminal there in that year. There were no entries or exits among portland cement suppliers during 1966 (CX 75, 76, 77, 78, 79 and 80).

70. In 1961, when all portland cement shipments to the KCMA were made directly from the suppliers' plants, concentration was very high. The top two suppliers accounted for 68.1 percent of all portland cement shipments into the KCMA. These suppliers were Lone Star and Missouri Portland whose plants were located in the KCMA. The top

four suppliers accounted for 86.9 percent of shipments into the KCMA (CX 75, 76, 93; Tr. 2250-51).

71. In 1961, delivery of bulk cement by trucks became prevalent and created a demand by KCMA customers for faster delivery. Ash Grove and General Portland reacted to that demand by establishing distribution terminals in the KCMA and thereby reduced the delivery time by truck to their customers. Ash Grove's terminal required an investment of two to three hundred thousand dollars. As a result, both Ash Grove and General Portland increased their shipments into the KCMA and their shares of that market in 1962, whereas the share of the two local suppliers dropped to 61.4 percent (CX 39F-I, 76, 79 and 93; Tr. 2375).

72. Top four concentration of suppliers to the KCMA continued to decline during 1963, 1964 and 1965 even though the identities and positions of the top three remained the same. The fourth ranked position changed back and forth between General Portland and Universal Atlas (CX 93).

73. Vertical integration between portland cement suppliers and consumers in the KCMA began in August 1962, when Ash Grove acquired one-third of the outstanding common and preferred stock of Lee's Summit, the sixth largest portland cement consumer among ready mixers (Ans. Par. 17; CX 83).

74. In 1963, Mississippi River Corp. announced that it had acquired Stewart Sand & Materials Co., the largest ready mixer in the KCMA and the largest portland cement consumer among ready mixers. Stewart consumed 528,000 barrels of portland cement in 1963 or 23.5 percent of all shipments into the KCMA and 31 percent of all purchases by ready mixed producers in that market. Mississippi at that time was building its own cement plant (CX 19B, 39K, 81, 83).

75. In 1964, Ash Grove acquired 50 percent ownership of Fordyce Concrete, Inc., the third largest cement consumer among ready mixers, and Missouri Portland acquired a preferred stock interest in Denny Concrete Co. in return for a 5-year portland cement requirements contract (Ans. Par. 10; Tr. 2506).

76. Missouri Portland, in 1965, acquired Botsford Ready Mix Company which was the second largest cement consumer among ready mixers. Botsford purchased 371,000 barrels of portland cement in 1965 which was 17.3 percent of the total consumed by ready mixers and 12.7 percent of the total shipped into the KCMA (CX 84, 86; Ans. Par. 24).

77. In 1966, Ash Grove acquired the remaining ownership in Lee's Summit and Fordyce. These companies individually were the seventh and third largest cement consumers among ready mixers, consuming 92,000 and 299,000 barrels of portland cement, respectively, in 1966,

which were 4.5 pcercent and 14.6 percent of the total consumed by all ready mixers, and 3.1 percent and 10.2 percent of all shipments into the KCMA (CX 84, 86).

78. At the time of its acquisition, Fordyce represented the largest single remaining ready mixed concrete company and the largest remaining regular purchaser of portland cement in the KCMA market not wholly owned by a cement supplier (CX 83, 84, 86).

79. Also in 1966, Ash Grove acquired certain assets, including quarry sites and equipment. These assets were formerly the Union Quarries Division of Union Construction Company. The business of Union Quarries included the regular purchase of portland cement. Such purchases amounted to 24,000 barrels in 1964, 26,000 barrels in 1965, and 18,000 barrels in 1966 (CX 8-0).

80. The businesses acquired by Ash Grove purchased a total of 409,000 barrels of portland cement in 1966 which was 13.9 percent of the total shipped into the KCMA market (CX 8-0, 80, 92).

81. Sometime during 1967 or 1968, a financial affiliation was created between Monarch and Concrete Materials, Inc. (CMI). Such an affiliation would influence the purchasing patterns of CMI for its portland cement supply. In 1968, CMI purchased 208,000 barrels of portland cement from Monarch which represented 83 percent of its total purchases (RX 56, pp. 12, 13; Tr. 3357, 2389, 2473-74).

82. In May 1968, Lone Star, the third largest portland cement supplier to the KCMA, expended some $500,000 to enter the ready mixed concrete business in the KCMA through internal expansion (RX 30; Tr. 2233, 2241-42).

83. From 1962 to 1968, a trend toward vertical integration developed in the KCMA. During that time, five of the ten cement suppliers to that market became vertically integrated with substantial cement consumers. Three of these did so by acquiring four leading ready mixers, a fourth through a financial arrangement and the fifth by internal expansion. By 1968, the five largest portland cement suppliers were vertically integrated with the five largest ready mixed concrete companies. Ash Grove's acquisitions of Fordyce, Lee's Summit and Union Quarries were a substantial part of that trend (CX 19B; Tr. 1640-43, 2325).

84. Fordyce Concrete purchased between 4.4 percent and 10.2 percent of all portland cement shipped into the KCMA during the years 1961 to 1966. Since 1963, it was the third largest portland cement consumer among ready mixed concrete companies making between 11.0 percent and 14.6 percent of all such purchases (CX 83, 84, 85, 86).

85. Lee's Summit purchased between 3.1 percent and 5.2 percent of all portland cement shipped into the KCMA during the years 1961 to

1966. It consistently ranked as the fifth to seventh largest portland cement consumer among ready mixed concrete companies, purchasing between 4.4 percent and 8.0 percent of all such purchases (CX 83, 84, 85, 86).

86. During the years 1964, 1965 and 1966, Union Quarries purchased 24,000 barrels, 26,000 barrels and 18,000 barrels of portland cement, respectively. These were substantial amounts and would qualify Union Quarries as a large consumer of portland cement in the KCMA (CX 8-0; Tr. 2115-16, 2211-13, 2368-69, 2321).

87. Fordyce, Lee's Summit and Union Quarries each had multiple sources of supply for their portland cement during the years prior to their acquisitions by Ash Grove (Tr. 1669-70; CX 8-0, 87, 88, 89, 90, 91, 92).

88. When a portland cement consumer becomes owned by a portland cement supplier, the latter has the power to foreclose other competing suppliers and the former will, where possible, obtain its portland cement requirements from the parent company regardless of the fact that competing suppliers offer to sell portland cement on a comparable basis of price, service and quality (CX 39L, R, S; Tr. 1635, 1640-43, 2133-39, 2229-37, 2325-26, 2377-82).

89. Competing portland cement suppliers to the KCMA testified about their decline in sales to the acquired companies subsequent to the latter's acquisitions even though they were competitive price, service and quality-wise with the acquiring companies, Mississippi River, Missouri Portland and Ash Grove.

90. Dewey Portland Cement Company had been developing Stewart as a customer and had increased its sales to a high of 70,000 barrels in 1964. When Mississippi River began supplying Stewart in 1965, Dewey's sales were cut in half in that year and completely foreclosed in 1966, 1967 and 1968 (CX 87-92; RX 25, p. 12).

91. In 1965, Universal Atlas sold 92,000 barrels of portland cement to Stewart. Sales declined to 12,196 barrels and 2,940 barrels in 1967 and 1968, respectively. Some sales were made to Botsford in each of the four years prior to its acquisition by Missouri Portland. No sales were made subsequent to the acquisition. Prior to its acquisition by Ash Grove, Fordyce purchased as much as 58,000 barrels. Sales declined to 8,355 barrels and 884 barrels in 1967 and 1968, respectively, and these sales were forced upon Fordyce due to Universal Atlas cement being specified for use on a particular job. Due to the foreclosure from sales, Universal Atlas, one of the Gas Belt plants which had a lower mill base than the plants in the KCMA, and which had supplied the KCMA for 50 years, considered making its own vertical acquisition. Instead, it widened its overall market area, shipping cement to the company's

Green Bay, Wisc., distribution terminal. Such shipments incurred much higher freight costs than shipments to the KCMA and, therefore, returned lower mill net profit. They were necessary, however, to maintain the Independence plant's capacity utilization and thereby avoid the double penalty of lower net profit and higher unit costs (Tr. 2115, 2136-39, 2296, 1733, 3120).

92. Lone Star, with a manufacturing plant located in the KCMA, sold as much as 103,000 barrels of portland cement to Stewart. However, no sales were made during 1965, 1966 and 1967, and only 11,000 barrels in 1968. The experience with Botsford was similar to that with Stewart; namely, no sales in 1967 and nine barrels in 1968. Sales to Fordyce dropped 50 percent in 1967 from 1966 and declined to only 1,000 barrels in 1968. Lone Star continued to solicit after the companies had been acquired and attributed the inability to make sales to the internal power of requiring the acquired companies to obtain their portland cement from their respective parents. Realizing that it was running out of large companies to solicit in the market due to vertical integration, Lone Star chose to respond by becoming vertically integrated itself through internal expansion (Tr. 2232-36).

93. General Portland considered Stewart, Botsford, Fordyce, Lee's Summit and Union Quarries as large consumers of portland cement. It sold as much as 115,000 barrels of portland cement to Stewart, however, sales declined to 25,000 barrels in 1966 and 1967 and dropped to just 2,000 barrels in 1968. Sales to Botsford and Lee's Summit were completely cut off after their acquisitions with General Portland's salesmen being told by those companies that it was a waste of time in continuing to solicit them. Sales to Fordyce declined to 10,000 barrels in 1967. No sales would have been made in 1968 unless General Portland acceded to the demand of Norman Fordyce, President of Fordyce Concrete and also the owner of Fordyce Materials, Inc., an independent ready mixer. General Portland was required to give Fordyce Materials a secret price cut in return for which Mr. Fordyce agreed to buy 32,000 barrels for Fordyce Concrete (CX 87-92; RX 25, pp. 34, 35; Tr. 2369, 2377-79, 2382-83, 2385-86).

94. OKC Corp. entered the KCMA in 1963 with sales of 43,000 barrels of portland cement to Botsford. Sales to that account increased in 1964 to 125,000 barrels. In 1965, when Botsford was acquired by Missouri Portland, sales by OKC fell to 5,000 barrels. No sales were made to Botsford in 1966, and total KCMA sales were 6,000 barrels. OKC withdrew from the KCMA at the end of 1966 (CX 79, 80, 89-94; RX 19).

95. Dundee Cement Company completed construction of a new 45 to 50 million dollar portland cement plant in Clarksville, Mo., in mid-

1967. That plant contained the largest kiln in the world and was highly automated. Dundee had planned to enter the KCMA since it was considered to be an important market and to make the sizeable investment required to construct a distribution terminal there capable of receiving delivery of portland cement by barge, the lowest cost form of transportation. Dundee, in 1967 and 1968, attempted to make sales in the KCMA, but was unable to sell to Stewart, Botsford and Fordyce/Lee's Summit due to their control by competitive cement manufacturers. Dundee was not able to successfully enter the KCMA and consequently no distribution terminal was established (Tr. 2313-15, 2317-22, 2325-26).

96. Concentration among the top four portland cement suppliers to the KCMA, which had been declining, increased from 75.2 percent in 1965 to 81.3 percent in 1966. In 1967 and 1968, Ash Grove increased its market share to 20.1 percent and 19.0 percent, respectively, and became the second largest supplier in the KCMA market. By 1968, the top four (Missouri Portland, Lone Star, Ash Grove, Universal Atlas) concentration was 76.5 percent and the top five (including General Portland) concentration was 85.3 percent. The two nonintegrated suppliers, General Portland and Universal Atlas, which were among the top five in 1965 were no longer there. Three of the 1968 top five, Ash Grove, Mississippi River, Missouri Portland, had vertically integrated by acquisitions of consumers, a fourth, by internal expansion (CX 93).

97. Entry into the portland cement industry is difficult because the manufacture of portland cement is a high fixed cost operation, requiring cement plants to be operated on a continuous twenty-four hour basis in order to achieve the necessary level of capacity utilization for profitable operation. One of the chief entry barriers is the fact that construction of a cement plant costs between $25 million and $50 million depending on the production capacity desired. Distribution terminals vary in cost from $175,000 to $3 million (Tr. 2143-45, 2209, 2226, 2315, 2320).

98. It is, therefore, clear that the KCMA market for portland cement is highly concentrated and entry into that market has become virtually impossible because of the high barriers and the difficulties in penetrating the market as a result of the substantial foreclosure of the market due to the merger trend. Three portland cement manufacturers were directly affected by the various mergers in the KCMA. These were Dundee Cement Company, OKC Corp. and Lehigh Portland Cement Company. Lehigh attempted to penetrate the KCMA in mid-1967, but was forced to change its marketing strategy, including abandoning construction of a distribution terminal in the KCMA. This was attributed to the fact that substantial consumers of portland

cement were removed from the market as a result of the vertical integrations in the KCMA (Tr. 2309-30). OKC Corp. attempted to penetrate the Kansas City market, but after three years it was forced to withdraw from the market. Lehigh who had supplied the KCMA for some time likewise withdrew as a supplier as a result of a vertical integration. In addition, General Portland which had served the KCMA since 1906, described the situation as desperate and considered withdrawing from the market (CX 79-80, 89-94; Tr. 2309-30, 2367, 2385-88, 2422-23).

Ready Mixed Concrete

99. During the period 1961-1966, some 20 ready mixed concrete companies operated at various times in the KCMA. Twelve such companies operated throughout the time period. Two companies began business in 1962, one in 1964, two in 1965 and one in 1966. Two other companies went out of business at the end of 1963 (CX 81, 82, 106).

100. Concentration, during the same period, was very high and had been increasing. The top four ready mixers increased their market shares from 60.5 percent in 1961 to a high of 67.7 percent in 1964, and ended the period with 66.4 percent. Between 1962 and 1966, the identities of the top four companies remained the same, the only change being among the positions in 1962. From 1963 through 1966, there were no changes in positions (CX 81, 82).

101. Fordyce Concrete, which began operations in April 1961, and which developed into a two-plant company serving the Kansas City metropolitan area, was consistently the third largest seller of ready mixed concrete between 1962 and 1966. Fordyce increased its market share from 6.6 percent in 1961 to 14.0 percent in 1966, during which time the overall market increased 28 percent (CX 2C and D; 8N; 38Z6; 81, 82).

102. Lee's Summit was among the largest of the remaining ready mixed companies which competed for the 32.3 percent to 39.5 percent of the KCMA ready mixed concrete market not controlled by the top four sellers in 1961 through 1966. In 1965, the year prior to their acquisitions by Ash Grove, Fordyce and Lee's Summit combined accounted for 18.5 percent of ready mixed concrete sales in the KCMA, and 18.3 percent in 1966 (CX 81, 82).

103. The largest ready mixed concrete companies, with their multiple plant locations, competed with each other as well as the smaller sellers located throughout the KCMA (CX 38R and V; Tr. 2478, 2504-05, 2521-22, 2548, 1906-07, 1916-23, 1823, 1937-41).

104. Ready mixed concrete business is obtained by offering favorable prices, good service and prompt delivery and maintaining

good personal relations with contractors (CX 38W, X, Z3-4; Tr. 2458-60; Stipulation re Davis and Shaw, Tr. 2514-15).

105. Other factors being equal, purchasers of ready mixed concrete will buy from the producer who offers the lowest price per cubic yard. A reduction of 25 cents or less per cubic yard might cause a customer to switch ready mix suppliers (CX 38X, Z3-4; Tr. 2459, 1822).

106. During the period 1961-1966, the overall cost of producing ready mixed concrete in the KCMA had increased. Prevailing prices for ready mixed concrete, however, had not kept pace with the rising costs. This situation resulted in low profitability or no profit at all for ready mixed companies (Tr. 2492-95, 1639-44).

107. By the end of 1966, the three largest sellers of ready mixed concrete in the KCMA, together with Lee's Summit, had been acquired by portland cement suppliers to that market. The acquired companies accounted for 58.5 percent of ready mixed concrete sales in the KCMA (CX 82).

108. Prior to their acquisitions, Lee's Summit was operated as a separate corporation, totally apart from Union Construction Company which operated the acquired quarrying assets as a division. Two of these quarries were at the same locations as Lee's Summit's ready mixed concrete plants (Tr. 1671).

109. Aggregates, such as those produced by Union Quarries, are one of the raw materials used in the manufacture of ready mixed concrete. They are the second most costly raw material accounting for about 25 percent of the total cost of raw materials (CX 111E and 112D; Tr. 2443-44, 2447, 2502).

110. In addition to Lee's Summit's ability to obtain the costliest raw material, portland cement, at less than prevailing market prices, it has the double advantage of obtaining its aggregates from its parent also at a reduced price. The vertically integrated Lee's Summit, therefore, has decisive cost advantages over its nonintegrated competitors, which if passed on in the form of lower concrete prices, could result in prices lower than competitors' costs, and force those competitors out of business (Tr. 2523, 2526, 2551-52, 1686, 1700, 1633-34).

111. The actual effects of the vertical integration in the KCMA is forcefully demonstrated by the history of Fordyce Concrete. Fordyce Concrete began in 1961 with $5,000 cash, leased equipment and property, and lines of credit with sand and rock suppliers. Within a month, Fordyce needed more cash. In less than two years, Fordyce borrowed an additional $150,000 to build up its truck fleet and secure additional working capital in order to pay bills. By 1964, Fordyce had no net worth and could not borrow from a bank. Cash needed was estimated at $600,000 to purchase equipment and furnish the truck

fleet. Fordyce was backed against the wall. At the beginning of 1965, Fordyce was ready to sell and get out of the ready mixed business. This new entrant had to keep borrowing money but had a financial statement which would not warrant a bank loan. Ash Grove purchased Fordyce for $300,000 (CX 19C, 38Z7, 8-12, 14, 17).

112. In the two years subsequent to its acquisitions of Fordyce and Lee's Summit, Ash Grove furnished additional financial aid. Lee's Summit was acquired on Jan. 4, 1966, for $1,250,000 and by Feb. 28, 1966, had been advanced $39,000. Fordyce received advances from Ash Grove in 1967, totalling $1,057,226, which increased in 1968 to $1,654,444.98. Also in 1968, Fordyce increased the KCMA ready mixed capacity by purchasing 39 new mixer trucks (CX 19C, 34, 97I).

113. Another example is Botsford Ready Mix Company. Botsford, the second largest ready mixer in the KCMA, was acquired by Missouri Portland in 1965, during which year it made a net profit of $84,846. Thereafter, that vertically integrated company operated at net losses which increased from $15,789 in 1966, to $75,751 in 1967, and $136,517 in 1968 (CX 82, 114C).

114. Concrete Materials, Inc. (CMI) had consistently been one of the top four ready mixed companies in the KCMA. At the end of 1966, CMI was the largest remaining independent ready mixed company in the KCMA. CMI had come under new management in mid-1963, which in two years was able to bring the company from a net loss of over $145,000 to a net profit of over $92,000. However, with the price of concrete being so low, CMI ended 1968 with a net loss of almost $91,000, and its management was fearful about CMI's ability to meet the drain on its reserves over a long enough period of time (CX 81, 82; RX 12; Tr. 2477-79, 2496, 1643).

115. Clayco Concrete Company and Denny Concrete Company are examples of two ready mixed concrete firms which were forced out of business in 1968 as a result of the low selling prices for concrete and the high production costs. These were independent firms which were not vertically integrated and consequently did not have the advantages which respondent was able to give to Fordyce and Lee's Summit, but were forced to leave the cement business when they ran out of operating capital (CX 81; Tr. 2542-57, 2504-07).

116. Entry into the ready mixed concrete business in the KCMA should be comparatively easy since the cost of the necessary equipment is not prohibitive and concrete technology, while not simple, can be acquired without great difficulty. However, without adequate financing, entry would be very difficult since costs were high and prices and profits were low. Any new entrant would have to take business from its competitors by cutting prices (Tr. 2287, 2303, 2499, 1903, 1914, 1639,

1644). The record makes it clear that as a result of the vertical integration, including the acquisitions of Fordyce and Lee's Summit by Ash Grove, entry would be virtually impossible in view of the fact that the integrated ready mixed companies were able to rely upon the help of a large cement parent company who could disregard profits on concrete sales and advance the concrete companies money when needed and the fact that the cement suppliers were under pressure to utilize their production capacities at a high level and that the large sellers of concrete had added to their truck fleets which further increased ready mixed capacity in the KCMA (CX 19A-C, 38Y, 38Z3, 38Z7-12, 38Z16-17; Tr. 2143-45, 2233-41, 2328, 2386, 1639-44, 1914, 1781-98, 1849-53).

117. When faced with similar situations as demonstrated in this record, the Commission has consistently held in the past that mergers in the same ready mixed market contravene Section 7 of the Federal Trade Commission Act. Such findings have been made in *Marquette Cement Manufacturing Company*, 75 F.T.C. 32 (1969); *Mississippi River Corp., supra*, and *OKC Corp., supra*.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and this proceeding is in the public interest.

2. The manufacture and sale of portland cement and ready mixed concrete are each proper lines of commerce for purposes of this proceeding.

3. The Kansas City market area is a proper section of the country within which to consider the effects of the acquisitions by the respondent found above.

4. The effects of the acquisitions found above may be substantially to lessen competition in the manufacture and sale of portland cement and ready mixed concrete in the Kansas City marketing area.

5. The acquisitions of the stock of Fordyce Concrete, Inc. and of Lee's Summit Ready-Mixed Concrete & Materials Company by Ash Grove Cement Company violate Section 7 of the Clayton Act, as amended.

6. The acquisition of the assets used in the operation of Union Quarries by Ash Grove Cement Co. violates Section 5 of the Federal Trade Commission Act, as amended.

ORDER

I

It is ordered, That respondent, Ash Grove Cement Company, a

corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, divest, absolutely, subject to the approval of the Federal Trade Commission, all stock, assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by respondent, as a result of the acquisitions of the stock of Fordyce Concrete, Inc., Lee's Summit Ready-Mix Concrete & Materials Company, and of the assets used in the Union Quarries quarrying business, together with all additions and improvements thereto and replacements thereof of whatever description, so as to assure that there is established separate and viable competitor(s) engaged in the business of producing and selling ready mixed concrete and aggregates.

II

It is furthered ordered, That pending such divestitures respondent shall not make or permit any deterioration or changes in any of the plants, machinery, equipment, buildings, or other property or assets to be divested which would impair their present capacity or market value.

III

It is further ordered, That none of the stock, assets, properties, rights or privileges required to be divested be transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Ash Grove Cement Company, or any of its subsidiaries or affiliates or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of voting stock of Ash Grove Cement Company, or any of its subsidiaries or affiliates.

IV

It is further ordered, That with respect to the divestitures required herein, nothing in this order shall be deemed to prohibit respondent from accepting consideration which is not entirely cash and from accepting and enforcing a loan, mortgage, deed of trust or other security interest for the purpose of securing to respondent full payment of the price, with interest, received by respondent in connection with such divestitures; *Provided, however,* That should respondent by enforcement of such security interest, or for any other reason, regain direct or indirect ownership or control of any of the divested plants, land or equipment, said ownership or control shall be

redivested subject to the provisions of this order, within one year from the date of reacquisition.

V

It is further ordered, That either (a) for a period of two years from the dates of divestitures of any ready mixed concrete plant or group of plants or other assets required by this order, or (b) for so long as respondent retains, directly or indirectly, a bona fide lien, mortgage, deed of trust, or other security interest in any of the property, plants, or equipment divested, whichever is longer, respondent may provide no more portland cement to that plant or group of plants or quarry operation than an amount, in tons, equal to thirty percent (30%) of the portland cement consumed by the plant or group of plants during the calendar year immediately preceding that in which divestiture is made; provided, however, that if the purchaser elects, and the Commission approves, respondent may supply up to 75 percent of such consumption of portland cement.

VI

It is further ordered, That either (a) for a period of two years from the dates of divestitures required by this order, or (b) for so long as respondent retains, directly or indirectly, such a bona fide lien, mortgage, deed of trust, or other security interest in any of the property, plants, or equipment divested, whichever is longer, respondent shall not sell or deliver, directly or indirectly, ready mixed concrete in the Kansas City area as defined in the complaint.

VII

It is further ordered, That respondent shall not install or operate any additional ready mixed concrete plant in the Kansas City area as defined in the complaint for a period beginning with the date this order becomes final and continuing until two years from the date of the final divestiture required by this order.

VIII

It is further ordered, That for a period of ten (10) years from the date this order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the sale of ready mixed concrete or concrete products within respondent's present or future marketing area for portland cement or which purchased in excess of

10,000 barrels or 1,880 tons of portland cement in any of the five (5) years preceding the merger.

IX

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order, and every sixty (60) days thereafter until the divestitures are fully effected, and every one hundred eighty (180) days thereafter until it has fully complied with the provisions of this order, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the divestiture provisions of this order, and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with any person or persons interested in acquiring the stock, assets, properties, rights or privileges to be divested under this order, the identity of each such person or persons, and copies of all written communications to and from each such person or persons.

Respondent shall also submit to the Commission within ninety (90) days of the close of each calendar year a full report of all facts required by the Commission to determine whether respondent is complying with Paragraphs V, VI, and VII of this order.

X

It is further ordered, That respondent provide a copy of this Order to each purchaser of plants and assets divested pursuant to this order at or before the time of purchase.

DISSENTING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

JUNE 24, 1975

Antitrust ranks alongside the flag, motherhood, and sliced bread in the national popularity sweepstakes and undoubtedly deserves much if not all of the vote of confidence it repeatedly receives in the opinion polls. Like all other good things, however, it can be overdone.

The Federal Trade Commission, understandably concerned with a large-scale merger wave that rolled across much of American industry in the boom years of the 1960's, developed a special concern with the way things were going in the concrete industry, the one that makes our building blocks and paves our roads. In brief, the F.T.C. found that the major suppliers to this industry, the leading cement producers, were buying up all their customers, the local ready-mix folks. Economists call

such supplier-customer marriages "vertical integration" and worry about the possibility that, after two or three big cement firms have bought up all the ready-mixers in a particular town, price fixing will replace competition all along the line and the price of both cement and concrete will rise to inflated levels.

This is an understandable fear and I have no quarrel with the application of the principle in question to one of the acquisitions this agency has condemned today. Reviewing an order by one of our administrative law judges that would have required Ash Grove Cement to divest itself of three concrete firms it had bought up earlier in Kansas City, the Commission here decides that the acquirer can keep one of them but must give up the other two. The one it is permitted to keep is Union Quarries, a firm that makes roadbed concrete and uses, in its production of that product, less than 1 percent of the cement shipped into Kansas City each year. This amount, says the Commission, is *de minimis* and hence can't, as the statute requires, "substantially" lessen competition in any meaningful economic market. So far, so good.

And the Commission similarly kept its eye on the ball when it affirmed the trial judge's decision that Ash Grove must sell another of these three firms, Fordyce, a purchaser of some 10.2 percent of the cement shipped into Kansas City. One can hardly deny that, if each of the 4 largest cement firms doing business in a given city is allowed to buy a customer holding 10 percent of the local concrete market, other cement producers are going to be foreclosed from at least 40 percent of the total business in town and hence that one of the major arteries feeding into the competitive life-line of that particular market might well suffer some significant amount of clogging. Those are the kinds of numbers that can leave the competition gasping for breath.

My Brethren lose their grip on the realities of the competitive arena, however, when they let their justifiable concern with the probable effects of such a substantial merger spill over onto the third one involved in this proceeding, Ash Grove's acquisition of a small ready mixer called Lee's Summit. This two-plant operation was bought in 1966 for a price of $247,000 and accounts for 3.1 percent of the cement shipped into Kansas City. Its net profits in that year were, as the majority notes, $21,000.

Men of keener discernment than I may be able to see in these numbers a threat to the hydraulics of the Kansas City concrete market but, try as I might, I cannot make it out. To be sure, this market is already concentrated and the law is reasonably intended to deal not just with the kind of monopolization that leaps upon us in great bounds but the kind that enters in small increments and sneaks in on little cat feet in the middle of the night. But 3.1 percent of a market? While

many economic phenomena-including monopoly pricing-are said to depend in the last analysis on events transpiring "at the margin," I cannot persuade myself that the Commission has not today shaved it all a bit too close. When the bologna is sliced so thin that it has only one side, there's not likely to be much nourishment in it. And if a profit of $21,000 on an investment of $247,000 represents the fruits of monopoly, then the latter is clearly an overrated grove.

One further point needs to be made here, the matter of allocating this agency's enforcement resources. The F.T.C.'s legal juggernaut has been rolling over these Kansas City transgressions for some six years now, a period longer than the one consumed by World War II. And while a substantial part of the $150,000 in attorney salaries that we have expended on this case to date would probably have been required in any event, surely a lesser sum would have been sufficient if we had elected to challenge only the key acquisition in the case, the one involving the 10 percent market share.

Nor is it an adequate answer to say that, whatever the wisdom of the choice we made in 1966, the costs associated with them are "sunk" now and thus should be ignored. Since there are no *additional* costs to our current budget in making this firm divest itself of two ready-mixers rather than one, the argument is naturally made that we have nothing to lose from making our divestiture order as comprehensive as the law will permit. Not so. Our staff uses our past decisions as guides to the kinds of cases it can expect us to look favorably on in the future. If we let this one pass without disapproval, more like it will surely appear on our calendar again. The final cost of today's decision is thus not the dollars that have been or will be spent on this particular matter but those that will be diverted away from more constructive areas in the years to come. The cost of what we do includes, as our economist friends have been telling us for years, the things our less productive expenditures have forced us to leave undone. The F.T.C. is uniquely qualified, for example, to launch a sophisticated attack on what is clearly the single most damaging offense against the American consumer, price fixing by agreement among ostensible competitors.[1] Yet we have allocated a tiny percentage of our budget next year to this problem, a deficiency that stems not from the overall inadequacy of our total budget but from the priorities we set for the staff in our planning sessions and in the decisions we hand down in the routine course of business.

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[1] See, for example, my review of this problem in "Price Fixing, Consumer Injury, and the Regional Offices," June 28, 1974. As I noted there: "If we assume that these conspiracies raise prices by say 10 percent on the average-a figure that, again, seems fairly conservative in view of the 15 percent to 75 percent figures reported in the few case histories we have seen so far-then we are talking about an aggregate consumer loss here of some $10 billion or more per year." *Antitrust Law & Economics Review*, Vol. 7, No. 2 (1975), p. 96.

I will be departing from this agency soon. If I leave no other legacy here, I hope at least one idea I have advocated will survive, the notion that real economic benefits to the consumer, not legal indignation, will ultimately become the touchstone of our case-selection process. An antitrust case that doesn't promise lower consumer prices, as I have had occasion to say before, is like a cow that doesn't give milk and is too stringy to eat.

Again, I see no consumer nourishment in the divestiture of 3.1 percent of the Kansas City concrete market and would admonish the staff to strike such trivial issues from our future pleadings. This agency has the important responsibility of seeing that competition, the mother of all that gives vitality to the economy of a free nation, is not allowed to perish. With so solemn a duty to attend to, the talented and dedicated men who staff and lead the Federal Trade Commission cannot afford the luxury of picking economic daisies along the roadside. Alas, we have picked part of one today.

CONCURRING STATEMENT

BY ENGMAN, *Commissioner:*

JUNE 24, 1975

I agree that Ash Grove's acquisitions of Lee's Summit and Fordyce violate the Clayton Act, and I further believe the public interest requires a divestiture order. But I would not be so certain of the public interest if Ash Grove had succeeded in convincing me, as it attempted to do in its brief, that these mergers fostered price competition. As the Commission opinion recognizes, a vertical merger may foreclose a portion of a market, and it may give leverage to discipline unintegrated competitors. Yet a vertical merger may also, in some cases, bring desirable efficiencies to a stagnating market, or inject a dose of needed price competition, and I would be hard pressed to support a divestiture in such a case. While I do not consider Ash Grove's consumer benefit arguments to be irrelevant, I do consider them unpersuasive and I concur in the Commission decision.

OPINION OF THE COMMISSION

BY HANFORD, *Commissioner:*

This matter is before us on respondent's appeal from the initial decision of the administrative law judge, filed Sept. 23, 1974. In that decision, respondent, Ash Grove Cement Company (Ash Grove), was found to have violated Section 7 of the Clayton Act, as amended, with respect to two separate acquisitions, and Section 5 of the Federal Trade

Commission Act, with respect to a third. As to each, divestiture was ordered, along with certain other relief. On appeal, respondent has challenged aspects of the law judge's findings as to liability and remedy in the case of each acquisition. Upon a full review of the record in this proceeding, including extensive briefing and oral argument on appeal, we must modify the initial decision and accompanying order as set forth below.

I

The following factual summary, amply supported by the record, indeed, substantially uncontested, provides a background for our disposition of this case. At the time of the challenged acquisitions, respondent, a Delaware corporation, was principally engaged in the manufacture and sale of lime and portland cement. In varying degrees, the company was marketing its cement in the eight States of Kansas, Missouri, Arkansas, Oklahoma, Texas, Iowa, South Dakota and Minnesota. During the years preceding the acquisitions, respondent's total average annual shipments were in the 5 million barrel range.[1]

Respondent has sold portland cement in the Kansas City area for well over sixty years. It maintains one of its two portland manufacturing facilities in Chanute, Kans., and, since 1962, it has operated a portland cement transfer station in Kansas City, Kans.[2] In the years 1961 through 1966, respondent shipped an annual average of some 404,166 barrels[3] of portland cement in the Kansas City metropolitan area (KCMA),[4] ranking consistently among the top-four suppliers. As a percent of total shipments in the area, this volume ranged from 12.8, in 1961, to a preacquistion high of 18.0 in 1963; in 1966, the year of the challenged acquisitions, respondent's percent of area shipments was 16.6.[5]

In June 1964, Ash Grove purchased 50 percent of the outstanding stock of Fordyce Concrete, Inc. (Fordyce), a Kansas corporation engaged in the manufacture and sale of ready-mixed concrete in the Kansas City area since 1961. On Nov. 8, 1966, the respondent purchased the remaining outstanding shares of Fordyce, thereby gaining total ownership.[6] At that time, Fordyce was operating two ready-mixed concrete plants in the area; and, for the fiscal year ending Jan. 31, 1966,

[1] CX 2B. In comparable years, the nationwide total portland cement shipments by all manufacturers annually averaged some 333,932,000 barrels CX 51 at 6.

[2] The "transfer station," or "distribution terminal," is a producer-controlled local distribution facility of fairly recent advent.

[3] CX 79 and CX 80.

[4] *See* note 17, *infra*.

[5] CX 79 and CX 80.

[6] Ash Grove paid $100,000 for its 1964 purchase of 5,225 authorized but previously unissued shares and, in 1966, paid $300,000 for the then remaining 5,225 shares.

the company demonstrated sales of over $2.8 million, with net profits of $34,910, and total assets of $1,259,003. By the end of 1966 Fordyce was the third ranking ready-mixed company in the KCMA, with 14.0 percent of the market in that year.[7] As a leading factor in the ready mixed market–and the largest, not wholly owned by a cement supplier–Fordyce consumed, in 1966, 10.2 percent of all shipments of portland cement in the market area.[8]

On Jan. 6, 1966, having previously acquired a one-third interest, respondent purchased the remaining outstanding stock in Lee's Summit Ready-Mixed Concrete & Materials Company (Lee's Summit), a Missouri corporation also in the ready mixed market in the Kansas City area.[9] At that time, Lee's Summit was operating two ready-mixed plants in the KCMA. For the fiscal year ending Feb. 28, 1966, the company demonstrated sales of $1,603,751, with net profits of $21,593, and total assets of $459,750. At the time Ash Grove acquired the remaining stock in Lee's Summit, the ready-mixed company ranked seventh in its market, with 4.3 percent of sales in 1966.[10] In that year, Lee's Summit consumed 3.1 percent of all shipments of portland cement in the market area.[11] Subsequently, Lee's Summit operations were merged into those of Fordyce with business continuing under the trade name "Fordyce-Summit."

As a part of the Lee's Summit transaction, Ash Grove also acquired certain real property and an extensive array of quarrying equipment.[12] These assets had evidently been those of a corporation, Union Construction Company, owned by the same individuals who held the outstanding stock in Lee's Summit. It would appear that the assets of Union Construction Company had been distributed to the stockholders; they, in turn, sold them to respondent for $1,050,000. The "Union Quarries" operated these assets in the production and sale of crushed stone and portland cement treated baserock in the Kansas City metropolitan area. The record reflects that in 1966, "Union Quarries"

[7] CX 82. In 1964 - the year respondent made its initial stock acquisition in the company - Fordyce was also ranked third, with 13.1 percent of the market.

[8] CX 86.

[9] In 1962, respondent made its initial one-third stock acquisition paying $47,500. The remaining two-thirds were purchased for $200,000.

[10] CX 82.

[11] CX 86.

[12] It could be argued that Lee's Summit and these "Union Quarries" assets constituted but a single acquisition. Both are incorporated into the same purchase and sale contract; both involved the same parties in the buyer-seller relationships; and, it may well be that the purchase of one served as partial consideration for the sale of the other. Nevertheless, the entire record has been built on the theory, set forth in the complaint, that the acquisitions were separate; and since our judgment concerning the competitive significance of the "Union Quarries" arrangement would remain unaltered whether viewed separately or together with Lee's Summit, we are inclined to take the pleadings as we find them on this issue.

purchased some 17,890 barrels of portland cement, presumably for use in the production of baserock.[13] These purchases were approximately 0.9 percent of the some 2,924,000 barrels of portland cement shipped in the KCMA that year.[14]

On July 8, 1969 the complaint in this matter was issued charging that "[t]he acquisitions by Ash Grove of Fordyce and Lee's Summit and their merger into one operation constitute separately and collectively violations of Section 7 of the Clayton Act, as amended, and the acquisition of the assets used in the operation of Union Quarries constitutes a violation of Section 5 of the Federal Trade Commission Act."

II

A delineation of relevant product and geographic market(s) is a necessary threshold to analysis and evaluation of the likely impact of an acquisition on competition.[15] In the case before us, the administrative law judge determined that there are two product markets ("lines of commerce") relevant to the issue of liability in each of the challenged acquisitions: (i) the manufacture and sale of portland cement; and (ii) the manufacture and sale of ready-mixed concrete. We note, as did the law judge, that such market definitions have been adopted by the Commission in a number of instances in the past.[16] Additionally, the law judge found that the appropriate geographic area ("section of the country") in which to analyze the competitive impact of each acquisition is the "Kansas City metropolitan area" (KCMA).[17] Based upon a consideration of the record, we agree with these conclusions.

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[13] CX 8-o.

[14] Subsequent to the acquisition, Ash Grove conveyed these assets to a newly established subsidiary, Union Quarries, Inc., a Missouri corporation. While the record is silent as to the volume of portland cement consumption by that company after the first quarter of 1967, it does reflect that 234 barrels were acquired in the initial 5 months CX 8-o.

[15] Such a consideration of competitive effect, in turn, provides the base for a determination of legality. Section 7 of the Clayton Act, as amended, provides in relevant part:

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly 15 U.S.C. §18.

This focus on competitive impact is, of course, equally applicable to acquisitions challenged under Section 5 of the Federal Trade Commission Act. *See, e.g., Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

[16] *Permanente Cement Co.*, 67 F.T.C. 334 (1965); *Diamond Alkali Co.*, 72 F.T.C. 700 (1967); *U.S. Steel Corp.*, 74 F.T.C. 1270 (1968); *rev'd on other grounds*, 426 F.2d 592 (6th Cir. 1970); *Mississippi River Fuel Corp.*, 75 F.T.C. 813 (1969), *aff'd*, 454 F.2d 1083 (8th Cir. 1972); *Marquette Cement Manufacturing Co.*, 75 F.T.C. 32 (1969); *OKC Corp.*, 77 F.T.C. 1342 (1970), *aff'd*, 455 F.2d 1159 (10th Cir. 1972).

[17] The KCMA is defined, both in the complaint and by the administrative law judge, as consisting of "* * * the Counties of Cass, Clay, Jackson and Platte, Missouri, and the Counties of Johnson and Wyandotte, Kansas." (complaint at 1; initial decision at 14). This geographic market, too, has been previously adopted by the Commission. *Mississippi River Fuel Corp.*, *supra*, note 16.

It was additionally alleged in the complaint that the United States as a whole was, as well, an appropriate

(*Continued*)

Respondent only indirectly challenges the product markets adopted in the initial decision, urging essentially that the administrative law judge's conclusions as to "line of commerce" were not based upon an independent consideration of the record.[18] This contention is buttressed solely by reference to language in Findings 33 and 48 of the initial decision which points out, *inter alia*, adoption of both lines of commerce is "in accord with" and "supported by" prior administrative and judicial decisions to the same effect.[19] Respondent's position completely ignores the wealth of record evidence supporting the adopted market definitions; moreover, it fails to acknowledge a number of quite specific findings made by the law judge leading readily to those definitions.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." (citation omitted) *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962). In articulating this primary standard, the Supreme Court indicated that even in situations where, by application of this test, a range of products or services might be found to appropriately constitute a broad market for analysis, "* * * within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." The Court provided a number of "practical indicia" for delineating such markets. These include: "* * * industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (citation omitted)[20]

The manufacture and sale of portland cement was, at the time of the acquisitions, a principal enterprise of Ash Grove, the acquiring firm. This material, a fine gray powder produced by burning and grinding raw materials such as limestone and shale together with gypsum,[21] provides a basic element in the production of concrete. Portland cement

geographic area in which to measure the competitive effects of the challenged acquisitions. The law judge, however, correctly concluded that the record fails to support such a contention. It is noted that counsel supporting the complaint have not sought to appeal this determination.

[18] We note, in passing, that respondent has cited other "examples" in support of its claim that the administrative law judge generally failed to give the record in this case his independent consideration. *See* respondent's appeal brief at 39-46. We have given this record, now, our own independent evaluation. While differing in certain respects with the law judge, we think it clear that his work has been creditable, as well as independent. We view respondent's contentions to the contrary as wholly without merit; thus, we adopt, and incorporate into our final decision, all findings of the administrative law judge not inconsistent with this opinion.

[19] Initial decision at 8, 12.

[20] 370 U.S. 294, 325. Such markets within markets are meaningful from an antitrust view "[b]ecause §7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), * * * [I]t is necessary [therefore] to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." (citation omitted) *Id.*

[21] CX 41; transcript at 2103-04.

is never used in construction by itself; rather, as when used in concrete production, it functions as a binder of aggregates.[22]

As the administrative law judge found, portland cement, while classified with other hydraulic[23] cements such as masonry cement, displays distinguishable physical characteristics. Thus, it is markedly heavier than masonry cement.[24] Portland cement prices are distinct from those of masonry cement.[25] As well, there is no indication in this record that the price of portland cement displays a sensitivity, or responsiveness, to the price of any other type of cement. The production facilities required for the manufacture of portland cement are, as a practical matter, unique for that purpose;[26] and competitors within the industry recognize the product as a separate line of commerce.[27] Highly specialized customers, ready-mixed concrete producers, by far account for the greatest quantity of portland cement sales.[28] Most significantly, portland cement's end-use as a binder in the manufacture of concrete is, indeed, unique. The administrative law judge determined, and the record is clear, that "[t]here is no practical substitute for portland cement in the manufacture of concrete."[29] In short, the demand for portland cement is a function of the volume of construction activity underway at any given time and is generally inelastic with respect to the price of other related products. This fundamental inelasticity is sufficient, we think, to meet the broad market standard set forth in *Brown Shoe, supra.* Furthermore, assuming *arguendo* certain other cement-types did manifest some cross-elasticity of demand with portland, the presence of virtually all "practical indicia" of a significant antitrust submarket renders the administrative law judge's determination of this issue patently correct.

The facts of record are equally dispositive as to the ready-mixed market. Ready-mixed concrete is produced by combining portland cement with various aggregates, primarily, rock, sand and water. Whether the mixture takes place, in whole or part, in bins and scale hoppers[30] at plant site, or in the revolving-drum trucks so characteristic of the industry, the concrete is mixed to standard strength specifications requiring a given mixture to withstand a specified

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[22] CX 41E.

[23] A "hydraulic" cement is one which hardens when combined with water.

[24] CX 54 at 4; transcript at 2108.

[25] Transcript at 2205.

[26] CX 41; transcript at 2112, 2209.

[27] Transcript at 2210, 2313.

[28] As respondent pointed out in its 1966 Annual Report: "Within the eight-state area in which we ship cement, the ready-mixed concrete producers are the largest volume users. Approximately, 60 percent of our total cement production went to the ready-mix concrete industry* * *" This was contrasted with direct sales of 23 percent to state and federal large volume construction projects Ash Grove's second-largest customer category. CX 181.

[29] Initial decision at 7. CX 38G; CX 54 at 7; transcript 2104, 2202-03, 2602.

[30] Concrete production facilities are specialized and not readily adaptable to other production uses. CX 38F-G.

pressure level. The product tends to be the single item manufactured and sold by ready-mixers;[31] and sales are made principally to construction contractors and subcontractors.[32] While some extremely large construction "pours" are competed for by only multiplant producers, in the main, both large and small ready-mixers are considered by their customers, and themselves, to be in competition.[33] Testimony of record indicates that although price is the primary basis of competition among ready-mixers, fluctuations in price are unrelated to price changes in other building materials.[34] In sum, each of these indicia - the peculiar characteristics and uses of ready mixed concrete; its unique production facilities, specialized vendors and customers; its pricing unrelated to other products; as well as industry and customer recognition of the market - provide abundant support for delineation of the manufacture and sale of ready-mixed concrete as an appropriate line of commerce.

Respondent's arguments with respect to the geographic component of the portland cement market are no more compelling.[35] In essence, respondent contends that the administrative law judge erred in adopting the KCMA as appropriate on the grounds that: (i) not all shipments of portland cement in the KCMA originate there; and (ii) certain firms supplying the KCMA also make shipments to locations outside the delineated area. Both of these contentions are correct; however, the argument they are designed to support fails to adequately consider the controlling standard for geographic market definition, as well as significant evidence of record.

The primary task in defining an appropraite geographic market for Section 7 purposes is to determine where the competitive effect of the particular merger under scrutiny will be "direct and immediate." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963). The Supreme Court has observed that "[t]his depends upon 'the geographic structure of supplier-customer relations.'"[36] More specifically, the Court has indicated that "* * * the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies,*' * * *" *Id.*, at 359. See *United States* v. *Phillipsburg National Bank and Trust Co.*, 399 U.S.

[31] CX 38D; CX 43 at 32D-2; Transcript at 2441, 2501, 2514-15.

[32] CX 38W; Transcript at 1682, 1732, 2449.

[33] Transcript at 1818-20, 1863-67, 1922-23, 1937-41, 2504-05, 2522, 2548.

[34] Transcript at 1755, 1856.

[35] Respondent apparently concedes the properiety of the KCMA as an appropriate geographic market for ready mixed concrete. *See* Respondent's Brief on Appeal at 53.

[36] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963). Indeed, this is particularly true in a vertical merger involving analysis of both supplier and customer product markets.

350, 362 (1970); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Thus, a "pragmatic, factual approach"[37] requires consideration of the "demand side" of a market, as well as an analysis of supplier behavior. Only then can the geographic market selected "* * * both 'correspond to the commercial realities' of the industry and be economically significant." (citation omitted)[38]

Respondent's endeavor to expand the geographic market adopted by the administrative law judge ignores facts pertaining to very real limitations on the supply options available to portland cement customers. For example, ready-mixers have limited storage capacity for raw materials. As a result, quick delivery from a portland cement supplier is of key importance. The fact that a majority of area suppliers have established production or distribution facilities within the KCMA, at substantial cost, well bears this out. Additionally, apart from crucial time delays involved in shipments from supply facilities more than marginally outside the metropolitan area, the high shipping costs of portland cement, in relation to its low product value per unit weight, soon render incremental distances economically unacceptable.

Respondent's argument does call attention to the behavior of suppliers; however, important facts relating to this aspect of the equation, too, are deemphasized. Thus, while suppliers did sell outside the KCMA, the importance they, themselves, attached to the metropolitan area is noteworthy. For example, Ash Grove's president testified to the importance of the Kansas City market, characterizing it as a market worth protecting.[39] Highlighting the significance of the market area to suppliers is the fact that by 1965, four major suppliers in the market, including respondent, had established local distribution terminals in order to expedite delivery to area purchasers. Indeed, two suppliers actually had production facilities in the metropolitan area. In 1966, 79.9 percent of all shipments from local distribution terminals were made to destinations within the defined market; moreover, as the law judge pointed out, in that year "* * * 72.0 percent of all portland cement shipments to all destinations located within the KCMA were made from the Kansas City area mills of Missouri Portland Cement Company and Lone Star Cement Corporation and the Kansas City area terminals of respondent, Universal Atlas Cement Division of U.S. Steel, General Portland Cement Company and Mississippi River Corporation. (CX 77, 78, 80, Tr. 2677, 3135, 3253)."[40]

Thus, we think a balanced analysis of the "commercial realities" of

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[37] *Brown Shoe Co.*, v. *United States*, 370 U.S. 294, 336 (1962).

[38] *Id.* at 336-7.

[39] CX 39E, R.

[40] Initial Decision at 13-14. We note that a procedure developed recently by Kenneth G. Elzinga and Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Anti-merger Suits*, 18 Antitrust Bull. 45 (1973),

(Continued)

the portland cement market support the adoption of the KCMA as an appropriate "section of the country" for purposes of this case.

III

In the case of each of the challenged acquisitions, Ash Grove, the acquiring firm, assumed ownership of a firm which, in the course of its business, was a purchaser of one of Ash Grove's principal products - portland cement. Acquisitions of customers or potential customers, by suppliers, are categorized as "forward vertical" mergers. The "tying" of a customer to a supplier is always suspect from an antitrust perspective;[41] in the event of merger, a permanent tie is established, and the need for analyzing the competitive effect of such a relationship is all the more acute.

When a supplier gains permanent control over the purchasing decisions of a customer, the basic competitive factors of the free market - price, quality and service - are no longer choice-determinative.[42] As the Supreme Court pointed out in *Brown Shoe*, "The primary vice of a vertical merger * * * is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' which 'deprive[s] * * * rivals of a fair opportunity to compete.' " (citation omitted)[43] The Court further stated: "Since the diminution of the vigor of competition which may stem from a vertical arrangement results primarily from a foreclosure of a share of the market otherwise open to competitors, an important consideration in determining whether the effect of a vertical arrangement 'may be substantially to lessen competition, or to tend to create a monopoly' is the size of the share of the market foreclosed."[44]

The foreclosure percentages with respect to both acquisitions of ready-mixers here are of significant proportion. As the administrative law judge found, in 1966, Fordyce consumed 10.2 percent of all portland cement shipments in the KCMA;[45] Lee's Summit, a smaller operation,

demonstrates the need to assess both supply and demand factors to define a geographic market (noted by the Commission previously in *Beatrice Foods Co.*, 81 F.T.C. 481, 524 n. 6 (1972). Elzinga and Hogarty espouse a concise method of defining geographic markets. According to their analysis, if 75 percent or more of the demand for the product in the selected area is met by suppliers in that area and if 75 percent or more of the supply of the product emanating from the selected area is consumed by users in that area, then the geographic market has been properly defined. To state their test briefly, if little enters an area from outside and little leaves the area from inside, that area is a relevant geographic market.

[41] *See Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330-31 (1962).

[42] As Commissioner Dixon has observed in analysis of a similar factual situation: "A substantial share of custom in a market may be obtained by a supplier through contractual exclusivity, not through competition based on offerings of price, quality or service. Competitors of the acquiring supplier may be competitively disadvantaged through permanent foreclosure of custom once open to competitive bidding." *United States Steel Corp.*, 74 F.T.C. 1270, 1289 (1968).

[43] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323-24 (1962).

[44] *Id.* at 328.

[45] Initial Decision at 19. This constituted 14.6 percent of all purchases by ready mixed companies.

accounted for 3.1 percent.[46] Yet, while these figures are, indeed, "important considerations" here and can, in no sense, be considered *de minimis*, there is no *per se* rule of illegality in testing a vertical merger under Section 7.[47] Rather, "[w]hether a particular vertical merger is illegal depends on the facts and the market setting in which it occurs."[48]

Foreclosure manifests a particularly anticompetitive character when it occurs as part of a trend toward forward integration in a concentrated market.[49] For example, in such a situation, barriers to entry, often already high, are raised in the supply market. As the percentage of foreclosed transactions grows, less of an open market remains to attract potential competitors of the integrated suppliers. The would-be entrant is thus faced with the choice of: (i) entering at the supply level to compete for a continually shrinking market dominated by oligopolists; (ii) entering at both the supply and customer levels, facing the significantly increased costs integrated entry implies; or (iii) abandoning all thoughts of entering the market. To create this series of options for a potential entrant is clearly to impede entry.[50]

Nor in such a situation are the anticompetitive effects of forward integration limited to the supply market. The leverage created in the hands of integrated suppliers can all too readily be put to use to discipline, if not eliminate, enterprises competing only on the customer level. This phenomenon was explained in *Marquette, supra:*

> By narrowing the margin between the price at which they sell cement on the open market and the price at which they sell ready-mixed concrete, the integrated firms can limit the profits and growth of the ready-mixed firm, many of which are small, local companies operating only in the NYMA, or perhaps even drive them out of business. It is, of course, unlikely that the integrated companies would utilize their leverage to drive independent ready-mixed firms out of the market. This kind of overt exercise of market power is unnecessary; nor is it essential that ready-mixed firms be kept in a state of complete dependency. All that is required is that unintegrated firms and prospective entrants be made aware of the ability of the integrated oligopoly group - whether acting collectively or simply in "follow-the-leader" fashion - to utilize its leverage. The net effect would be to keep any of the independents from competing too aggressively, to maintain prices above competitive levels, to keep out new entrants - in short, to permit the ready-mixed market to function as a highly concentrated oligopoly. (citations omitted)[51]

In 1966, ten portland cement suppliers were serving the KCMA.

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[46] *Id.* This percentage amounted to 4.5 percent of all purchases by ready-mixed companies.

[47] *See Marquette Cement Mfg. Co.*, 75 F.T.C. 32, 103 (1969).

[48] *Id.* at 103-104.

[49] Brodley, *Oligopoly under the Sherman and Clayton Acts - From Economic Theory to Legal Policy*, 19 Stan. L. Rev. 285, 319 (1967).

[50] *See Marquette Cement Mfg. Co.*, 75 F.T.C. 32, 96-97 (1969).

[51] *Id.* at 102.

Four of those firms, including respondent, shared 81.3 percent of the total market.[52] Thus, the KCMA portland cement market was characterized as a highly concentrated oligopoly. Moreover, the Fordyce and Lee's Summit acquisitions were part of a marked trend toward forward integration into the ready-mixed market. Thus, in 1963, a year after Ash Grove's initial investiment in Lee's Summit, the Mississippi River Corporation[53] acquired Stewart Sand & Gravel Company, the largest ready-mixer in the KCMA — at the time, consuming some 23.5 percent of all portland cement shipments in the market.[54] The following year, Ash Grove made its initial 50 percent investment in Fordyce, the third largest ready mixer. In 1965, Missouri Portland Cement Company, the long-standing market leader, acquired Botsford Ready Mix Company, the second largest consumer of portland cement among ready-mixers with 12.7 percent of total shipments in the market.[55] In 1968, the Lone Star Cement Corporation, long a leading firm in the portland cement market, integrated by internal expansion into the ready-mixed market at a cost of some $500,000. In short, the Fordyce and Lee's Summit acquisitions took place in the concentrated oligopoly of portland cement manufacture and supply in the KCMA, a market in the process of integrating forward into the manufacture and sale of ready-mixed concrete, the business of its principal customer. Once the Fordyce and Lee's Summit operations had been fully taken over by Ash Grove, integrated suppliers in the market controlled some 58.5 percent of ready-mixed concrete sales in the KCMA[56] and had, by vertical integration, "captured" over 40 percent of the total portland cement market.[57]

In this context, we conclude that Ash Grove's two ready-mixed acquisitions, in the long run, can have none other than an effect on competition proscribed by Section 7 of the Clayton Act.

We must, however, take a different view of the "Union Quarries" transaction. In 1966, "Union Quarries" was in the business, *inter alia*, of producing and selling portland cement treated base rock. This required making certain purchases of portland cement; and, of course, the extent of those purchases constituted some foreclosure of the overall portland cement market. As pointed out above, the record indicates 1965

[52] The record reflects that while there had been some slight decrease in four-firm concentration in the years preceding the acquisitions, there was an increase between 1965 and 1966 (CX 93); moreover, at no time in the five year period prior to the acquisitions could the market be characterized as less than "highly concentrated." (CX 94).

[53] While Mississippi River Corp. was not a factor in the supply market prior to the Stewart acquisition, by 1966, having entered as an integrated firm, it ranked among the top four (CX 93).

[54] CX 85. This figure amounted to 31 percent of all purchases by ready-mixers.

[55] CX 86. This was 17.3 percent of total ready-mixer consumption.

[56] CX 82.

[57] CX 86.

purchases by "Union Quarries" of some 17,890 barrels. This amounts to less than 0.9 percent foreclosure.[58] While we do not rule that such a small percentage will be in all cases insignificant,[59] the record here fails to demonstrate that in this particular situation any effect on competition, in any market, would be other than *de minimis*.[60] We therefore reject the administrative law judge's conclusion that "[t]he acquisition of the assets used in the operation of Union Quarries by Ash Grove Cement Co. violates Section 5 of the Federal Trade Commission Act, as amended."[61] The order will be modified accordingly.

IV

In the notice of contemplated relief issued with the complaint in this matter, the Commission sought to provide for divestiture of the challenged acquisitions, together with the imposition of a limited-duration ban on any further acquisitions of ready-mixers by respondent. The administrative law judge, in rendering his initial decision, augmented these provisions with: (i) a post-divestiture limitation on respondent's sales of portland cement to the divested firms;[62] (ii) a moratorium on ready-mixed concrete sales or deliveries by respondent into the KCMA;[63] and (iii) a ban on respondent internally expanding, or in any sense operating, as a competitor in the ready-mixed market in the KCMA for at least two years after divestiture.[64] On appeal, respondent has objected to the inclusion of these three provisions in any final order we may issue here.[65]

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[58] Indeed, incomplete data for 1967 suggest a far smaller amount purchased in the year after the acquisition. CX 8-o.

[59] We note that in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), one of the product lines in which a violation was found to have occurred involved only 1 percent foreclosure.

[60] Unlike the portland cement and ready-mixed concrete markets, in which "Union Quarries" has no discernible effect, there is no "portland cement treated base rock" market described in these proceedings; nor is there sufficient data to analyze "Union Quarries" in terms of backward integration by a ready-mixer into aggregates supply.

[61] Because of our disposition of this acquisition on the merits, it is unnecessary to pass on respondent's jurisdictional contentions. We note, however, that the Commission's power to challenge noncorporate acquisitions under Section 5 is well-settled. *Dean Foods Co.*, 70 F.T.C. 1146 (1966); *National Tea Company*, 69 F.T.C. 226 (1966); *Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *Foremost Dairies, Inc.*, 52 F.T.C. 1480 (1956). Its Section 5 power to order divestiture is equally clear. *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1 (7th Cir. 1971); *Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

[62] Initial Decision at 31 (Par. V).

[63] *Id.* at 32 (Par. VI). The law judge would order that this restriction, as well as that contained in Par. V, be maintained for two years after divestiture, or so long as respondent retains a security interest in the divested property, whichever is longer.

[64] *Id.* (Par. VII).

[65] Respondent has also challenged that portion of paragraph I of the law judge's order which would require divestiture of the "Union Quarries" assets. In light of our disposition of that aspect of this case, *supra*, respondent's objection to paragraph I is moot. That portion of paragraph I relating to "Union Quarries" is not made a part of our final order.

We are unable to find an adequate basis in this record to justify these additional provisions.[66]

In support of limiting respondent's sales to Fordyce and Lee's Summit for a period following divestiture, counsel supporting the complaint argue that there has been a prolonged "block-out of competitive effort"[67] in portland cement sales to the acquired ready-mixers. Simple divestiture will not be sufficient, so the argument runs, to eliminate the foreclosures which have long been maintained, and reinforced, by trading habit as well as corporate structure. This argument is not unreasonable on its face; and, indeed, it may be compelling in other market contexts - or on a stronger record demonstration of necessity. We think, however, in the case of a homogeneous product such as portland cement, in a market admitted to manifest price competition, there appears little reason to foreclose respondent from any segment of that market. In this context, customers, even those newly severed from a parent, can be expected to buy from the supplier making the best price and offering the best service. Without a clear showing that this is not likely to occur in absence of the proposed competitive restriction, we are unwilling to order it here.

The argument advanced for keeping respondent out of the KCMA ready-mixed market for a time is equally unpersuasive. When asked during oral argument to cite record evidence justifying the competitive prohibitions of Paragraph VI and VII of the law judge's order, counsel supporting the complaint could allude only to testimony of ready-mixers to the effect that a vertically integrated competitor puts an "independent" at a competitive disadvantage. While we receive such testimony as credible, we fail to see how it renders the order provisions in question in any way related to the offenses found. More importantly, we are simply at a loss to discern what relationship these provisions could bear to restoring the state of competitive vigor the market might have enjoyed but for the illegal acquisitions.

In the instant case we conclude that paragraphs V, VI and VII of the administrative law judge's order, on the record before us, have not been demonstrated as necessary to effectuate relief in this matter. Accordingly, these provisions are not made a part of our final order.

V

It remains for us to dispose of respondent's contention that the

[66] In *Papercraft Corp.* v. *FTC*, 472 F.2d 927 (7th Cir. 1973) the Court of Appeals pointed out that while "* * * divestiture orders have included special provisions designed to insure the survival of the divested business, * * *" it is "essential" that such orders be based upon supporting findings which demonstrate "* * * the need for a special protective provision." (citation omitted) *Id.* at 931-32. We are unable to glean such findings from the record before us.

[67] Transcript of Oral Argument at 54.

issues in this case were prejudged by the Commission in "an unauthorized trade regulation rule proceeding." In what must be considered a gross misconstruction of the Commission's involvement in the cement industry,[68] respondent raises the question of prejudgment for our consideration yet a third time. Respondent puts forth no new argument to convince us that the Commission erred in deciding "prejudgment" in its Interlocutory Opinion and Order in this matter, Oct. 14, 1969.[69] Nor has any reason been suggested for abandoning the Commission's subsequent determination in response to respondent reraising the issue, along with its ill-conceived "*ultra vires*" argument, Dec. 5, 1972.[70] Finally, there is absolutely no indication that the current Commission, or any of its membership, has prejudged any issue in this case or shown bias in any way since the issue was last resolved. In short, the respondent's contentions as to prejudgment and Commission bias were baseless when previously adjudicated, and they are baseless now.

Final Order

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having denied, in part, and granted, in part, the appeal; accordingly,

I

It is ordered, That respondent, Ash Grove Cement Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date of this order becomes final, divest, absolutely, subject to the approval of the Federal Trade Commission, all stock, assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by respondent, as a result of the acquisitions of the stock of Fordyce Concrete, Inc. and Lee's Summit Ready-Mix Concrete & Materials Company, together with all additions and improvements thereto and replacements thereof of whatever description, so as to assure that there is established one or more separate and viable competitors engaged in the business of producing and selling ready-mixed concrete.

[68] *See, e.g.*, Respondent's Brief on Appeal at 47-52, *passim*.
[69] *Ash Grove Cement Company*, 76 F.T.C. 1076 (1969).
[70] *Ash Grove Cement Company*, 81 F.T.C. 1051 (1972).

II

It is further ordered, That pending such divestitures respondent shall not make or permit any deterioration or changes in any of the plants, machinery, equipment, buildings, or other property or assets to be divested which would impair their present capacity or market value.

III

It is further ordered, That none of the stock, assets, properties, rights or privileges required to be divested be transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Ash Grove Cement Company, or any of its subsidiaries or affiliates or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of voting stock of Ash Grove Cement Company, or any of its subsidiaries or affiliates.

IV

It is further ordered, That with respect to the divestitures required herein, nothing in this order shall be deemed to prohibit respondent from accepting consideration which is not entirely cash and from accepting and enforcing a loan, mortgage, deed or trust or other security interest for the purpose of securing to respondent full payment of the price, with interest, received by respondent in connection with such divestitures; provided, however, that should respondent by enforcement of such security interest, or for any other reason, regain direct or indirect ownership or control of any of the divested plants, land or equipment, said ownership or control shall be redivested subject to the provisions of this order, within one year from the date of reacquisition.

V

It is further ordered, That for a period of ten (10) years from the date this order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the sale of ready-mixed concrete or concrete products within respondent's present or future marketing area for portland cement or which purchased in excess of 10,000 barrels or 1,880 tons of portland cement in any of the five (5) years preceding the merger.

VI

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order, and every sixty (60) days thereafter until the divestitures are fully effected, and every one hundred eighty (180) days thereafter until it has fully complied with the provisions of this order, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the divestiture provisions of this order, and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with any person or persons interested in acquiring the stock, assets, properties, rights or privileges to be divested under this order, the identity of each such person or persons, and copies of all written communications to and from each such person or persons.

VII

It is further ordered, That respondent provide a copy of this order to each purchaser of plants and assets divested pursuant to this order at or before the time of purchase.

Commissioner Thompson dissenting.

IN THE MATTER OF

GIFFORD-HILL & COMPANY, INC.*

Docket 8989. Order, June 25, 1975

Complaint counsel's second request that Commission seek an all writs injunction denied.

ORDER DENYING SECOND REQUEST TO SEEK INJUNCTION

This matter is before the Commission on the certification by the administrative law judge of complaint counsel's motion entitled "Second Request for Action Pursuant to the All Writs Act." In a prior "Request," counsel supporting the complaint asked the Commission to seek an injunction to prevent the sale of one of the three ready-mixed firms, the acquisition of which is challenged in the complaint in the above-captioned matter. Since the sale had been consummated by the time the matter came before us, we considered the request for an injunction moot, and denied the motion. By this "Second Request," complaint counsel again asks the Commission to seek an injunction

* For appearances, see p.948, herein.

pursuant to the All Writs Act, but, in this instance, as to the possible divestiture of all properties subject to the complaint except the ready-mix property which has been divested.

In support of his motion, complaint counsel has filed an *in camera* affidavit affirming that two persons with affiliations in the cement and concrete business have volunteered information which has led complaint counsel to believe that respondent is undertaking a program to divest all or a portion of the assets which are the subject of the complaint. If the program is carried out, complaint counsel contends the Commission will be denied an opportunity to "approve such contemplated" divestitures, and "an opportunity to order a particular divestiture plan which may identify a preferable purchaser" so as to restore competition in the relevant markets.

By an answer filed June 20, 1975, Gifford-Hill has opposed the "Second Request," arguing that complaint counsel has failed to make a showing that there is "a reasonable probability of an antitrust violation * * * with respect to the acquisition of the companies to be subject to the requested injunction," and, more specifically, has failed to show "that Gifford-Hill has any intention of irretrievably breaking up a formerly 'viable' company." Gifford-Hill does not deny that it is presently engaged in negotiating the sale of the acquired companies.

Even if we assume the truth of what the persons reported to complaint counsel concerning the sale of the properties challenged in the complaint, we are without sufficient facts upon which to base a decision as to whether an All Writs injunction, as requested by complaint counsel, is warranted and should be sought. In the present posture of this matter, the administrative law judge is in a better position to ascertain these facts. If he determines that a program such as is alleged by complaint counsel would make an "effective remedial order * * * virtually impossible,"* it is within the law judge's authority to grant a request for compulsory process if necessary to obtain information that would support a motion for an injunction pursuant to the All Writs statute before the Circuit Court. Accordingly,

It is ordered, That counsel supporting the complaint's Second Request that the Commission seek as All Writs injunction be, and it hereby is, denied.

Commissioner Thompson not participating.

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* *FTC* v. *Dean Foods Company*, 384 U.S. 597, 605 (1966).

ADVISORY OPINIONS WITH REQUESTS THEREFOR

Advertising and selling as "new" test automobiles used for emission control tests. (File 753-7005)

Opinion Letter

Mar. 7, 1975

Dear Mr. Kirk:

This is in response to your letter of Sept. 16, 1974 requesting the Commission's opinion on the right of automobile manufacturers to advertise and sell as "new" those test automobiles used to demonstrate compliance with air pollution control standards.

Your letter indicates that the Environmental Protection Agency is developing a regulatory program under the Clean Air Act that would require both domestic and foreign manufacturers to select and test annually a statistical sample of production vehicles. The sample would consist of a "few hundred" vehicles per model year per manufacturer.

The proposed test itself requires that each selected vehicle be operated for the equivalent of about fifty miles. Manufacturers would be permitted to accumulate as much as 4,000 miles on each selected vehicle prior to testing if they thought such accumulation necessary to overcome the erratic emission performance that is typical of new engines. The issue is whether manufacturers would have the right to advertise and sell any of these test vehicles as "new."

After careful deliberation, the Commission has determined that it cannot conclude, as a matter of law, that automobile manufacturers have the right to sell such test vehicles as "new." Each manufacturer's testing may raise unique questions. Therefore, the Commission would prefer to defer a more definitive opinion until it receives a request from an auto manufacturer.

By direction of the Commission.

Letter of Request

Sept. 16, 1974

Dear Mr. Tobin:

EPA is developing a regulatory program under the Clean Air Act, as amended, which will require both domestic and foreign automobile manufacturers to demonstrate that production vehicles comply with applicable air pollution emission standards. Because these regulations allow a manufacturer to accumulate up to 4,000 miles on production

vehicles selected for testing, we are requesting an advisory opinion based on current FTC rules or decisions as to whether such mileage accumulated in accordance with the proposed program, as outlined below, will affect the right of the manufacturer to advertise and sell such tested vehicles as new automobiles.

The regulations will require a manufacturer to select and test upon request by EPA a statistical sample of production vehicles. Because the EPA testing requirement is imposed on a statistical sample of selected models only, it is anticipated that no more than a few hundred vehicles per model year per manufacturer will require testing based on EPA regulations. Prior to the testing of such vehicles, the manufacturer may, if he so desires, accumulate mileage on the vehicles in order to stabilize exhaust emissions. This provision is intended as an accommodation to the manufacturers who claim that a new vehicle exhibits erratic emission performance during the first few miles of use until the engine and emission control system settle into more predictable operating modes. This phenomenon is sometimes referred to as the "green engine" effect. Such mileage accumulation prior to testing is solely at the option of the manufacturer. We anticipate that, in most instances, manufacturers will elect to accumulate the minimum mileage necessary to perform the emission test which is about 50 miles.

In summary, the EPA regulations will result in new vehicles being required to accumulate mileage prior to being delivered by manufacturers to their dealers. The accumulated mileage may range from a minimum of about 50 to a maximum of 4,000 miles.

Your advice as to the status of such test vehicles as "new automobiles" and the manufacturers' right to sell them as such would be appreciated prior to the scheduled proposal of these regulations within the next thirty days.

Thank you for your cooperation in this matter.

Very truly yours,
/s/ Alan G. Kirk II
Assistant Administrator for
Enforcement and General Counsel (eg-329)

No. 147. Granting of "back-haul" allowances to customers picking up their own orders. (72 F.T.C. 1050, 16 C.F.R. §15.147)

No. 483. "Backhaul" Allowances advisory opinion affirmed. (File No. 683 7026, released Dec. 26, 1973, 83 F.T.C. 1843, 16 C.F.R. §15.483) Clarification of Ruling (File No. 683 7026).

1173

Clarifying Opinion Letter

Mar. 19, 1975.

Dear Mr. Silbergeld:

Your letters of Nov. 8, and Dec. 12, 1974, have been considered by the Commission. The Commission is of the view that a useful purpose would be served by providing brief review and comment relative to the various points that you have raised.

Principally referenced in your initial letter was Commission Advisory Opinion No. 147, issued Oct. 24, 1967, relating to "backhaul" allowances. You characterize that opinion as constituting a form of government "regulation" and suggested, *inter alia*, that the opinion mandates waste and inefficiency in transportation.

Advisory Opinion No. 147 was directed to a rather narrow issue, *i.e.*, whether General Foods Corporation, the company that requested the Commission's opinion, might violate Section 2(a) of the Clayton Act as amended, if it required its rank and file customers to continue to purchase from it pursuant to a uniform zone delivered price system while, at the same time, it offered varying freight-related allowances to "private-carrier" customers positioned to take "dock" delivery. The allowances would vary according to whatever common carrier charge would apply if, in fact, delivery were made to those customers' home locations.

That such deviations in customer pricing could result in illegal price discrimination would seem fairly apparent once the situation is examined. For example, different "private-carrier" purchasers, even though purchasing the same goods, in the same quantities, by precisely the same method - *i.e.* by pick-up in their own trucks at General Food's dock or warehouse, would buy those goods at substantially different net prices under General Foods' proposal. Substantial net price differentials would not only obtain among and between individual "private-carrier" purchasers taking "dock" delivery, but those purchasers would be provided, in turn, varying net purchase price advantages over "delivered-price" customers of General Foods supplied from that same shipping point.

The Commission in connection with its responsibility to enforce the requirements of Section 2 of the Clayton Act, as amended, advised General Foods that, assuming the presence of other elements necessary to a determination of violation of the statute, implementation of its proposal would probably result in a violation of law.

The choice of the basic underlying pricing system, addressed in the opinion, was General Foods'. The issue raised by General Foods was *not* with respect to the merits of its delivered price system but, rather, the

legal consequences of particular departures from that system. The Commission's opinion, accordingly, neither operated to approve or disapprove the *premises* on which the matter was presented. The opinion, moreover, did not foreclose the possibility that means to insulate against or avoid illegal discrimination, might be devised. No such measures were subsequently proposed to the Commission however.

In the period following the Commission's 1967 General Foods advisory opinion, it became increasingly apparent that the opinion was being divergently interpreted by the business community as well as other interested individuals and groups. On the basis of representations by a number of interested parties, including the Cost of Living Council and National Commission on Productivity, the Federal Trade Commission very carefully reviewed and reconsidered the matter. On Dec. 26, 1973, it issued a statement to clarify Advisory Opinion No. 147.

Many of the same points that you advanced also concerned the Commission. For example, you observed:

> Nowhere in the Opinion, however, is there any consideration as to whether the "delivered price" system may have anti-competitive or anti-consumer effects by disallowing the implementation of efficiencies which may lower prices to consumers. In fact, nothing in the Robinson-Patman Act or Section 5 of the Federal Trade Commission Act requires use of a "delivered price" system or prevents the supplier from selling goods "F.O.B. plant" * * *.

The Commission, in its clarifying statement of Dec. 26, 1973, addressed some of these very concerns. It announced its intent to scrutinize delivered price systems in the food products industry in order to determine whether they are unfair to customers or to ultimate consumers, and thus violate Section 5 of the FTC Act. It additionally announced in that connection that it intended to develop empirical information on the impact of delivered price systems on food prices. Such an investigation was, accordingly, directed by the Commission.

In its clarifying statement, the Commission also sought to make it clear that although the granting of "backhaul" allowances (based on the customer's actual freight costs) by a seller using a uniform zone delivered pricing system could indeed raise Robinson-Patman questions, a nondiscriminatory option offered by such a seller to all customers to purchase at a true f.o.b. shipping point price, would not.

Some unfortunate confusion has arisen as a result of the Commission's use of the term "true f.o.b. shipping point price." In fact, no question of unlawful discrimination would arise so long as the f.o.b. price is (1) uniform and (2) available to all customers on a nondiscriminatory basis. No legal requirement exists that the alternative f.o.b. price be of any particular amount or computed in any particular way.

The availability to customers of such an option would preclude any

legally recognizable competitive injury resulting from any customer's election to purchase at the higher "delivered" price.

Antitrust enforcement is premised on the concept that the self-regulating forces of competition are preferable either to government regulation, on the one hand, or private utilization of economic power, on the other, applied to gain control over, or to apply anticompetitive strictures within, competitive markets. Antitrust, therefore, targets trade practices falling within the latter category. Neither the Commission's Advisory Opinion No. 147 nor its clarifying statement of Dec. 26, 1973 are viewed by the Commission as being "regulatory" in nature.

The Commission's investigation of the food products industry is actively in progress. That investigation is at once multi-faceted and complex. Included within its compass is the impact on prices and the fairness to customers and to ultimate consumers of delivered pricing systems operative in the food products industry. It is not possible at this stage of investigation to specify final completion dates for various phases of this investigation. If and as constraints of an antitrust nature may be disclosed, however, the Commission will take direct and affirmative action. If no such constraints are disclosed, it is not contemplated that the Commission would take any action which would serve to encroach upon the traditional prerogative of sellers to unilaterally determine their own prices and terms of sale.

By direction of the Commission.

Letter of Request

Nov. 8, 1974

Dear Mr. Chairman:

This is a request, in accord with your highly commendable speech in Detroit last Oct. 7, for the Commission to take action to eliminate government-mandated waste in the transportation of goods. As you stated in your Detroit speech, "By the time you get a piece of meat from the pasture to the plate, it carries with it numerous transportation charges." Consumers end up paying these charges, whether they are included in the price of meat for dinner or in the price of ball bearings, metal tubing, electronic devices and other components contained in the refrigerator we use to store that piece of meat.

The Federal Trade Commission's Advisory Opinion No. 147 is a form of government regulation which mandates the kind of waste in transportation which increases the price of the hypothetical piece of meat (and the refrigerator). We hereby request, therefore, that the Commission repeal Advisory Opinion No. 147 and issue a policy

statement approving the kind of discount for backhauling which the Opinion now prohibits.

Advisory Opinion No. 147, released Oct. 24, 1967, prohibits a company from receiving any discount from a supplier's "delivered price" if that company uses its own trucks to haul purchased goods from the supplier's warehouse or factory - even though (1) the company may be able to haul the goods more cheaply than the common carrier, and/or (2) the company may realize substantial savings by hauling the goods in trucks which will be in the supplier's vicinity in any event and which now return to the company garage empty because Opinion No. 147 makes such backhauls illegal.

In effect, the Advisory Opinion mandates the wasteful empty return trip plus any savings the company may be able to realize over the cost of carrier transportation. This is precisely the kind of waste which your Detroit speech highlights as inflationary, and this is an opportune time for the Commission to eliminate this cause of waste of transportation facilities and motor fuel resources.

The Advisory Opinion, in fact, concedes that the conclusion it reaches "may seem unreasonable from one point of view" but determines that this conclusion is a necessary result of the supplier's use of a "delivered price" system. Nowhere in the Opinion, however, is there any consideration as to whether the "delivered price" system may have anti-competitive or anti-consumer effects by disallowing the implementation of efficiencies which may lower prices to consumers. In fact, nothing in the Robinson-Patman Act or Section 5 of the Federal Trade Commission Act requires use of a "delivered price" system or prevents the supplier from selling goods "F.O.B. plant" and adding a transportation charge to those customers which utilize common carriers for transportation. The net result is simply an absolute disincentive to efficiency.

I hope that the Commission will be able to act on this request expeditiously and favorably, in the consumer's interest.

Sincerely,

/s/ Mark Silbergeld

Supplemental Letter of Request

Dec. 12, 1974.

Dear Mr. Chairman:

On Nov. 8, 1974, I wrote to you regarding the Commission's Advisory Opinion No. 147, which appears to mandate certain inefficiencies in

industrial transportation, while implementing Section 2(a) of the Robinson-Patman Act, as interpreted by the Commission.

While awaiting your reply, I have discovered a Dec. 26, 1973, F.T.C. news release which "clarifies" Opinion 147, seemingly by authorizing the establishment and use of true "F.O.B. factory" prices by sellers which continue to use zone delivered pricing systems. The Dec. 26 statement continues, however, to prohibit allowances for backhaul.

The statement also discloses the Commission's stated intent to:

1. Scrutinize delivered pricing systems in the food products industry in order to determine whether they are unfair to customers or to ultimate consumers, and thus violate Section 5 of the F.T.C. Act.

2. Develop empirical information on the impact on food prices of such delivered price systems which will enable it to make this determination.

In view of continuing double-digit food inflation, the outcome of these inquiries is, obviously, of great interest and significance to consumers. Therefore, I would appreciate it if, in your forthcoming reply to my original letter, you could indicate some approximate target date by which the Commission anticipates that it will be able to take some action on or make some disposition of the delivered pricing system inquiry.

I look forward to your reply with interest, and appreciate your attention to this matter.

Sincerely,

/s/ Mark Silbergeld

Collection and distribution of cost production statistics from and to members in the printing industry. (Docket 459 - United Typothetae of America, et al., 6 F.T.C. 345)

Opinion Letter

Mar. 24, 1975

Dear Mr. Fellman:

The Commission has considered the request in your letter of Dec. 19, 1974, for advice as to whether your client, Printing Industries of America, Inc. (hereinafter referred to as "P.I.A."), may engage in a proposed course of action without violating the cease and desist order issued by the Commission in the above-captioned matter on Aug. 17, 1923. Your letter states that your client, P.I.A., is the successor to United Typothetae of America.

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From your letter, it appears that P.I.A. proposes to collect certain statistics and disseminate them to the industry it represents. The proposal is referred to as the "Budgeted Hourly Cost Program" and will be available to both P.I.A. members and non-members. The program will include three basic features: (1) seminars; (2) collection and dissemination of information; and (3) providing computerized data services. In regard to (1), P.I.A. will hold a series of regional educational seminars to acquaint printers with the realities of cost accounting techniques as applied to the printing industry and inform them of the "Budgeted Hourly Cost Program." The seminars will be designed to sell printers the value of accurate cost accounting. In regard to (2), members joining the program will provide basic cost data. This data will be compiled on a regional basis and average regional costs will be developed. Such costs will be returned to the members for comparison purposes. In regard to (3), P.I.A. will transmit the sheets containing the members' basic cost data to a computer service company for processing. P.I.A. will receive back a printout by the computer of the Budgeted Hourly Cost Comparison Sheets. These sheets will be distributed to the regional affiliate association of members. P.I.A. will encourage the affiliates to hold their own educational seminars in conjunction with the distribution of the sheets. Thus, industry members will be provided "with a method of accurately computing their own costs of operation and with a means of comparing an individual company's cost with an average of the costs that have been reported in the geographic region in which the industry member competes."

The order in Docket No. 459, *inter alia*, prohibits respondent:

2. From requiring or receiving from members and others using respondents' uniform cost accounting system, identified and itemized statements of production costs for the purpose of calculating average, normal or standard costs of production and from publishing them to members and the trade generally as "Standard Price List" or "Standard Guide" or association cost or price list under any other name.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that the operation of proposed "Budgeted Hourly Cost Program," particularly the publishing or dissemination to members and others of average costs of production, would violate the order issued in this matter.

By direction of the Commission.

Letter of Request With Exhibits

Dec. 19, 1974

Dear Sir:

We are writing to you on behalf of our client Printing Industries of America, Inc., 1730 North Lynn Street, Arlington, Virginia 22209, and

requesting an advisory opinion under Section 3.61(d) of the Commission's Rules of Practice regarding the legality of our client's proposal to collect certain statistics and disseminate the same to the industry it represents.

Printing Industries of America, Inc. (hereinafter referred to as P.I.A.) is the largest trade association in the graphic arts industry. In the United States there are an estimated 35,000 commercial printers of which more than 7000 belong to P.I.A. Industry gross volume annually exceeds 10 billion dollars.

This year P.I.A. celebrated its 87th anniversary. In serving its industry for this period of time, P.I.A. has seen many dramatic changes occur. Computer age technology has had a revolutionary effect in the printing industry. Increased demands for specialty printing has created a large number of printing houses devoting themselves exclusively to areas such as financial printing, label making, computer type setting, binding, business forms, etc.

Today the printing industry, encompassing all facets of the graphic arts, is facing a new challenge.

Eighty per cent of the commercial printers in the United States are small businessmen with less than 20 employees. For these shops to compete against the larger printers, management must be able to fully utilize the new production machinery on the market from both a technical and economic standpoint.

P.I.A. is presently providing members with educational materials on new technical developments. P.I.A. tells its members that equipment is available and that such equipment is designed to function in a stated manner.

However, this information is not sufficient for the small printer. He can review P.I.A.'s material; he can evaluate material provided by the various manufacturers; but he must be able to estimate the operating costs of the equipment in his own shop, and subsequent to purchase, he must have a way of developing cost figures to show whether or not he is using his equipment efficiently.

P.I.A. does not provide its members with a means of making this type of cost analysis at present.

A management profile of the 28,000 printing shops having less than 20 employees would show remarkably similar executive structure. Management would consist of one individual, the owner of the business. This manager is usually a trained technician in printing in contrast to an individual with an M.B.A.

In the graphic arts industry, the owner of a small shop started typically as a pressman or printing salesman. Over the years, he

acquires some good "seat of the pants" business knowledge but rarely becomes proficient in cost accounting.

This manager today is trying to compete against larger companies with highly sophisticated management teams. He is competing in a market place characterized by many sellers, most of whom produce similar products. He is competing in an industry with a rapidly developing highly computerized technology placed in an economy attacked by rapidly rising inflation and presently in a period of strong recession. Finally, there is a shortage of paper, his basic raw material.

It is obvious that the small printer needs a quick, simple and yet thorough means of developing and analyzing information as to operational costs.

P.I.A. seeks to meet this need through its proposed "Budgeted Hourly Cost Program."

Although we are of the opinion that the P.I.A. proposed program would not if instituted constitute a violation of the laws administered by the Commission; we request this advisory opinion because of the fact that P.I.A. is the successor to the United Typothetae of America. P.I.A. was created 29 years ago and has not, to our knowledge been named as a party in any antitrust suit by the F.T.C. or the Department of Justice during its existence. However in 1923, fifty-one years ago, the F.T.C. entered an order against its predecessor, United Typothetae of America [See F.T.C. v. United Typothetae of America, et. al, Docket 459, 6 F.T.C. 345 (1923)].

Section 2 of the order entered into in that case limits certain statistical collection activities of the Association but not, we submit, the activities proposed herein.

The P.I.A. Budgeted Hourly Cost Program is designed to provide industry members with a method of accurately computing their own costs of operation and with a means of comparing an individual company's cost with an average of the costs that have been reported in the geographic region in which the industry member competes.

We emphasize that no information with regard to prices will be part of this program. No statistics will be gathered with regard to profit, profit ratios, prices, sales, cost ratios relating to gross sales volume or any other factor that would enable one to use this program to determine industry price levels.

The program will be available to both P.I.A. members and non-members.

The program includes three basic features:

(1) Seminars
(2) Collection and dissemination of information
(3) Providing computerized data services.

If the program is implemented, P.I.A. will hold a series of regional educational seminars to acquaint printers with the realities of cost accounting techniques as applied to the printing industry and inform them of the Budgeted Hourly Cost Program. These seminars will be designed to sell printers the value of accurate cost accounting.

If the program is implemented, P.I.A. will begin the collection of basic data. All data collected will be kept confidential. No one competitor will be provided with data submitted by another competitor.

Basic data will be collected via the Specification Sheets attached hereto as Exhibits "A" and "B." As explained by the definitions contained in Exhibit "C" in connection with data development, P.I.A. expects that it will lean heavily on its regional affiliates. As a federation of regional associations, P.I.A. is composed of individual company members who enter P.I.A. by joining one of its regional affiliates. P.I.A.'s regional managers are in direct contact with members and have indicated widespread grass root demand for this type of a service. The proposed program would work as follows.

In calculating individual company budgeted hourly costs based on their actual company information, P.I.A. will undertake the following:

1. Though direct mail, periodicals and meetings programs, P.I.A. will make the availability of this service known.

2. Printing companies that register for the program will be sent sufficient P.I.A. Budgeted Hourly Cost Specification Sheets (Exhibit A) to provide information on the cost centers for which they want calculations made. They will also be sent definitions (Exhibit C).

3. The printing company then will send the completed P.I.A. Budgeted Hourly Cost Specification Sheets to P.I.A.

4. The Specification Sheets will be reviewed for completeness and apparent consistency. If the data appears to be correct, it will be sent to a data processing firm for processing. If it appears to be incorrect, it will be returned to the respondent to recheck.

5. When the data is sent to the data processing firm for processing, it will be sent under a code number so that the computer cannot be called on to printout confidential information about any printer except via a code number which will be controlled by P.I.A.

6. The data service will then compute the Budgeted Hourly Cost Comparison Sheets for the individual printing company (Exhibit B).

7. The company data sheets will be forwarded to P.I.A. for review and distribution.

8. P.I.A. will then send the company's Budgeted Hourly Cost Comparison Sheets along with another set of definitions (Exhibit C) back to the company.

9. Participating companies will be encouraged to resubmit data for recalculation of budgeted hourly costs whenever significant changes in costs have been incurred.

The regional managers of the various P.I.A. affiliated associations will meet with P.I.A. headquarters staff and review regional cost problems. Minor amendments to basic forms will be made if necessary to include local requirements.

Members joining the program will provide basic cost data. This data will be compiled on a regional basis and average regional costs will be developed. Such costs will be returned to the member for comparison purposes. This is the second facet of the program.

It is necessary for a program of this nature to be regional as major costs such as labor, rent, electricity, etc. vary substantially in different regions of the country.

Cost centers would obviously have to be limited to the most common pieces of equipment used in an area so that adequate data bases would exist. Once a cost center is designated, information will be compiled to provide regional averages for analysis. P.I.A. will review regional data for completeness and apparent consistency. Following its review of a region's Budgeted Hourly Cost Specification Sheets, P.I.A. will transmit the sheets to a computer service company for processing. The processing will consist of the following:

a. Input of the data from each Budgeted Hourly Cost Specification Sheet into the computer.

b. Mathematical manipulation of the data in accordance with the computer program.

c. Printout by the computer of the Budgeted Hourly Cost Comparison Sheets. (Exhibit B).

The computer printed Budgeted Hourly Cost Comparison Sheets will then be sent to P.I.A. for review and distribution to the regional affiliate association. The affiliate can option either one of two methods of distribution.

a. It can either obtain the computer printout from P.I.A. and reproduce these for distribution among its regional membership; or

b. P.I.A. will print and distribute the information directly to the affiliate's members.

The above will include incorporating definition of terms and an explanation of the use of the averages being provided. (Refer to "Definitions" Exhibit C).

P.I.A. will encourage the affiliates to hold their own educational seminars in conjunction with the distribution of the Budgeted Hourly Cost Comparison Sheets. This facet of the program will enable members to determine how efficiently they are using their equipment.

As was mentioned, the procedures which have been described are similar except for two important points. First, the regional/area averages are compilations of averages from a particular area; whereas, with the company service aspect of the program, the data is based on data developed within and by individual companies.

Second, with regard to area averages the data will be distributed to any and all interested companies. Distribution of individual company data will be restricted to just that company.

It is the belief of P.I.A. that implementation of the proposed program will strongly aid competition by providing the smaller printer with the economic analysis presently available to the larger printer.

As the state of our economy is such that this information is becoming more and more necessary daily, it is respectfully requested that the Commission give this matter top priority. The printing industry is the third biggest private employer in the nation based on U.S. Department of Commerce statistics and as this program is designed to primarily benefit more than 80 percent of that industry, it has sufficient importance to the economy to justify immediate consideration by the Commission.

We have been requested by our client to inform the Commission that any additional information or explanation requested will be provided immediately in an effort to expedite this matter.

Should any such additional information be necessary, it would be appreciated if contact be made with the undersigned or Jerald A. Jacobs of this firm.

Very truly yours,

COUNIHAN, CASEY & LOOMIS

/s/ Steven John Fellman

Exhibit "A"

PIA Budgeted Hour Cost Specifications Sheet

1. Cost Center Name ________________
2. Description ________________
3. Crew complement to be built into rate (No. of employees) ________________
4. No. of productive hours available, one shift ______ Hrs. Wk. ________________
5. No. of hrs. over ______ hrs. per wk., per shift, in computations ________________
6. No. of shifts to be used in computations ________________
7. Investments in profit center, equipment only ________________
8. Investments in profit center, peripheral equipment ________________
9. Method and rate of depreciation: ______ yr. life ________________
10. Floor space, total square feet ________________
11. Total horsepower of all motors ________________
12. Direct labor: ______ Employee @ ______; ______ Employee @ ________________

_____ Employee @ _____; _____ Employee @ _____
_____ Employee @ _____; _____ Employee @ _____

13. Overtime cost over _____ hr. per week, time and one-half _____
14. Supervosory Labor: _____% of Line 12 _____
15. Indirect Labor: _____% of Line 12 _____
16. Vacation Pay, _____ weeks per employee _____
17. Holiday Pay, _____ days per employee _____
18. F.I.C.A. Taxes: _____% on first _____ earnings _____
19. U.C., W.C. Insurance _____
20. Group Insurance _____
21. Pensions _____
22. Gas (Rate: _____ per 100 cu. ft.) _____
23. Light and Power: (Rate _____ per KWH) _____ KW Hours _____
24. Direct departmental supplies and expenses _____
25. Spoilage: _____% of value of production _____
26. Repairs: (2% of investment per shift or actual) _____
27. Machinery and equipment taxes: _____ per _____ _____
28. Machinery and equipment insurance: _____ per _____ _____
29. Building and heat (rent): (_____ per sq. ft. per year) _____
30. Mfg. Admin. & Gen. Plant Expenses: _____
31. General Administrative Expenses: _____
32. Selling Expenses: _____
33. List _____ no. of actual chargeable hours last year _____
34. List _____% chargeable hours which you will use as a basis for budgeting this cost center _____
35. List _____% chargeable hours averaged _____

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EXHIBIT B

BUDGETED HOUR COST COMPARISON SHEET

Date Computed

Center Name: ______	BUDGETED HOURLY COST Y/E ______	ACTUAL HOURLY COST Y/E ______	REGIONAL AVERAGE
COST CENTER BASE DATA			
Crew complement to be built into rate (No. of Employees)			
No. of productive hours available, 1 shift ______ hrs. wk.			
No. of hrs. over ______ hrs. per wk., per shift, in computations			
No. of shifts used in computations			
Investment in profit center, equipment only			
Investment in profit center, peripheral equipment			
Method & Rate of Depreciation: ______ yr. life			
Floor space, total square feet			
Total horsepower of all motors			
VARIABLE EXPENSES			
Direct labor: ______ Employee @ ______; ______ Employee @ ______			
______ Employee @ ______; ______ Employee @ ______			
______ Employee @ ______; ______ Employee @ ______			
Overtime cost over ______ hr. per week, time & one-half			
Supervisory Labor: ______% of Line 10			
Indirect Labor: ______% of Line 10			
Vacation Pay, ______ weeks per employee			
Holiday Pay, ______ days			
F.I.C.A. Taxes: ______% on first ______ earnings			
U.C.C., W.C. Insurance			
Group Insurance			
Pensions			
TOTAL PAYROLL & RELATED EXPENSES			
Gas (Rate: ______ per 100 cu. ft.)			
Light & Power: (Rate ______ per KWH) ______ KW Hours			
Direct Departmental Supplies & Expenses			
Spoilage: ______% of value of production			
Repairs: (2% of investment per shift or actual)			
TOTAL VARIABLE EXPENSES			

FIXED EXPENSES			
Depreciation (rent), equipment: add ____% for ____ shifts			
Machinery & equipment taxes: ____ per ____			
Machinery & equipment insurance: ____ per ____			
Building & Heat (rent): (____ per sq. ft. per year.)			
TOTAL DIRECT EXPENSES			
Mfg. Admin. & Gen. Plant Expenses: ____% of Line 26			
TOTAL MANUFACTURING EXPENSES			
General Administrative Expenses: ____% of Line 33			
Selling Expenses: ____% of Line 33			
TOTAL ALL INCLUSIVE COST			
STATISTICAL DATA			
VARIABLE COST per chargeable hour based on activity of:			
Actual chg. hrs. last year ____			
Rate used last year			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
MFG. COST per chargeable hour based on activity of:			
Rate used last year			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
ALL INCLUSIVE COST per chargeable hour based on activity of:			
Rate used last year			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			

DEFINITIONS

(Refer to Exhibit B for Line Number Correlations)

Line 1.

Crew complement to be built into rate (no. of employees):. . . .For industry area averages purposes this figure may include the prevailing union manning tables, open shop statistics or a combination of the two. For the individual company it should of course be based on actual company manning.

Line 2.

No. of productive hours available, 1 shift hrs. wk. . . . This statistic refers to the standard number of hours in the work week. This figure is variable from company to company in any area. For area average purposes it may represent the standard work week recognized by the union(s) or typical open shops or a combination thereof. For individual companies it should be based on the actual situation existent. It normally excludes vacation and holidays, for the annual total(s).

Line 3.

No. of hrs. over hrs. per wk., per shift, in computations. . . . This item may or may not be included in area average presentation. It is a provision for those circumstances where overtime is involved as a regular matter. For example, a company may guarantee 10 percent overtime to its employees. Under these circumstances this should be taken into consideration in the calculation of budgeted hour cost. For average area practice this factor may not be relevant.

Line 4.

No. of shifts used in computations. . . . This should normally be an exact figure or figures; i.e., one, two and/or three shifts. Frequently more than one condition will be presented and in some cases all three possibilities will be presented.

Line 5.

Investment in profit center, equipment only . . . This item may be the current installed replacement value of the equipment in the cost center factored with a composite of typical companies in an area or based on some other general average situation. In an individual company situation it would typically come directly from company ledgers, although a company could rationalize replacement cost as being more realistic. Whatever method is used, it must be used uniformly.

Line 6.

Investment in profit center, peripheral equipment. . . . This item involves exactly what its title implies, special tables, instruments, etc. It is listed separately because it may be overlooked. The same conditions which apply to item 5 above also apply here.

Line 7.

Method and rate of depreciation: yr. life. . . . The important factor here is that years of life be reasonably reflective of typical practice or the actual company situation. The number of shifts worked is a factor since equipment life is function of wear as well of obsolescence.

Line 8.

Floor space, total square feet. Where space is shared by two or more pieces of equipment this would be prorated among the equipment in question. General aisles and storage space would normally not be included here. Companies should use their actual plant layout as a basis for space allocation.

Line 9.

Total horsepower of all motors. . . . This is derived by adding the horsepowers of all motors operating in the cost center and applying it to this item. The figure will be used in determining Light and Power on Line 22.

Line 10.

Direct labor: ______ Employee at ______; etc. These rates for area average purposes may be based on current union contract conditions or a composite of the area. They should reflect individual plant condition where the plant is attempting to budget its expected costs.

Line 11.

Overtime cost over ______hr. per week, time and one-half. . . . This item may or may not be included in average area or individual company calculations. This depends on how hour costs are rationalized. Certainly where overtime is worked as a regular matter or is guaranteed, this factor should be included.

Line 12.

Supervisory Labor: ______ percent of Line 10. . . . Supervisory wages are generally applied as a percent of direct labor. This percentage will either be based on typical situations for industry area averages or on actual experience for individual company presentation purposes.

Line 13.

Indirect Labor: ______percent of Line 10. . . . This item includes miscellaneous labor such as floor handlers of paper, janitorial service and others who should be allocated or who assist in the work of the cost center.

Line 14.

Vacation Pay, ______ weeks per employee. . . . This factor may or may not be included in the calculations depending on whether it is rationalized as part of the hours available for work or not.

Line 15.

Holiday Pay, ______days. . . . Holidays are treated the same as vacation, i.e., they are normally excluded from the hours available and therefore considered additionally.

Line 16.

F.I.C.A. Taxes: ______ percent on first ______ earnings . . . . This item will be presented in accordance with current federal regulations.

Line 17.

U.C., W.C. Insurance. . . . These rates will be presented according to current area composites or individual company rates.

Line 18.

Group Insurance. . . . This item will be based on typical or specific company program benefits.

Line 19.

Pensions. . . . This item will be based on typical or specific company program benefits.

Line 20.

Total payroll and related expenses. . . . This item is self defining.

Line 21.

Gas (Rate: ______ per 100 cu. ft.). . . . When gas is involved, other than for general heating, this factor must be determined based on anticipated usage.

Line 22.

Light and Power: (Rate ______per KW11) ______KW Hours . . . . This factor relates to item 9 plus any specific lighting requirements for the cost center.

Line 23.

Direct Departmental Supplies and Expenses. . . . This item includes things not normally charged directly to customer work; that is, since paper and ink are normally charged directly to customer work and apart from the hour cost, these items are of course not included. Press blankets, packing, paste, etc. probably should be included in this item. The test is if the item is charged directly to the customer it is not included here. If it is

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associated with the cost center but not directly charged to the customer it is included here.

Line 24.

Spoilage: _____ percent of value of production. . . . Refers to work which must be redone because of errors in preparation or poor quality. It does not cover waste. Waste is concerned with material losses due to normal trimming of paper, machine set up and makeready losses, etc. Waste is normally provided for in the materials section of job estimates.

Line 25.

Repairs: (2 percent of investment per shift or actual). . . . Refers to replacing equipment parts and the labor associated with these replacements. Repairs would cover such things as the replacement of bearings and other integral mechanical parts as opposed to replacement of routine expendables such as press blankets, etc., these latter would be included in supplies, etc.

Line 26.

Total Variable Expenses. . . . This item is just a sub-total of cost elements so far presented.

Line 27.

Depreciation (rent), equipment: Add _____ percent for _____ Shifts. . . . The item for depreciation covers only the equipment involved in the cost center. When the equipment is rented rather than owned, the rental rate may be substituted for depreciation.

Line 28.

Machinery and equipment taxes: _____ per _____ . . . . This item provides for property taxes which are applicable to just the equipment which is part of the cost center. Local or individual company rates should be used.

Line 29.

Machinery and equipment insurance: _____ per _____. . . . This item provides for insurance coverage which is applicable to just the equipment in the cost center.

Line 30.

Building and Heat (rent): (_____ per sq. ft. per year). . . . Determine the total number of square feet in the plant occupied by the production area, and divide the total annual cost of rent and utilities by this figure. In so doing, the cost of footage, lighting, heat, air-conditioning, etc., for all office space, storage areas, wash rooms and such are spread to units of the production department on an equitable basis as well as the cost applicable to the production unit itself. Firms which own their real estate should substitute annual building depreciation for the rent aspect.

Line 31.

Total Direct Expenses. . . . This is just a sub-total of expenses accumulated to this point.

Line 32.

Manufacturing, administrative and general plant expenses _____% of Line 26. . . . This item should cover all other manufacturing expenses which have not been covered by the above items except usually for warehousing. It would include salaries for a production office, the plant executive and his staff, etc., as well as any other items of expense not already allocated. These items are of course to be spread across all cost centers on some equitable basis.

Line 33.

Total Manufacturing Expenses. . . . This item is just another sub-total.

Line 34.

General Administrative Expenses: _____% of Line 33. . . . General administrative expenses are intended to cover all of the general office expenses which are not directly

applicable to sales or production. In most cases it would cover the accounting department, the general office staff and probably the chief executive officer and his staff. It would normally cover related salaries, rent, etc.

Line 35.

Selling Expenses: % of Line 33. . . . This item should normally cover all selling expenses; such as salaries, commission, advertising, travel, rent, heat and light, etc., as directly related to the cost of selling.

Line 36.

Total All Inclusive Cost. . . . This item is just a total of all foregoing expenses, but it should include all cost factors except those associated with outside purchases which are charged directly to work.

Lines 37, 38 and 39.

These lines are special calculations which show two things. First, the impact of equipment utilization on hour cost; i.e., the higher the rate of utilization (sold machine hours) the lower will be the hour rates for a cost center.

It is normal to show at least two different rates here. One rate, such as 75 percent would be considered a target rate or one which is considered to be competitive. The second might be based on actual average experience.

The second aspect of these line items is to show the effect of the various cost factors on the budgeted hour rate. Line 37 shows the effect of all so called variable manufacturing costs. Line 38 shows how these rates increase when fixed manufacturing costs are also included. Finally, Line 39 shows the cost when all costs are included.

"Dry-testing" and "bulk-loading" a continuity book series by mail order. (File No. 753 7003)

Opinion Letter

Mar. 27, 1975

Dear Ms. Hunter:

This is in response to the request submitted by Wentworth Press for an advisory opinion concerning the propriety under the Federal Trade Commission Act of "dry-testing" and "bulk-loading" a continuity book series by mail order.

It is the Commission's understanding that Wentworth is an editorial packaging house that prepares the layout and performs other editorial services for publishers who market continuity book series by mail order. Wentworth assists in the preparation of the promotional material for a continuity book series and the book series itself. A continuity book series is a set of multiple volumes, related by subject matter, sent at period intervals to subscribers. Generally, each book is sent on approval, and may be returned by the subscriber. A bill accompanies each book.

Wentworth is considering entering into contracts with marketers which would involve the use of dry-testing various continuity book series. As defined by the requester, dry-testing is a practice in which

the marketer disseminates promotional material by mail to members of the general public soliciting subscriptions to a continuity book series, before the books have been published. Whether or not the book series is actually published depends upon the size of the response to the solicitation. Wentworth's first question is whether such dry-testing of a book series is permissible under the Federal Trade Commission Act and rules and regulations promulgated thereunder.

Wentworth's second question involves the legitimacy of "load-ups" through the mail. Under the proposed plan, the marketer would initially send a single volume of the continuity book series to subscribers each month. Each volume would, in effect, be received on an approval basis; subscribers could review each volume individually, and decide whether to accept or reject it. Subscribers would be billed each month for each volume accepted. In a "load-up," the subscriber is notified by the marketer, during the course of the series, that the remaining volumes are available and will be sent at one time in a bulk shipment, if the customer so desires. A customer accepting the bulk shipment would continue receiving monthly bills for individual volumes.

On the basis of its understanding, the Commission does not object to the use of dry-testing a continuity book series marketed by mail order as long as the following conditions are observed:

(1) No representation, express or implied, is made in advertisements, brochures, or other promotional material, which has the tendency or capacity to mislead the public into believing that the books have been or will definitely be published, or that by expressing an interest in receiving the books a prospective purchaser will necessarily receive them.

(2) In all solicitations for subscriptions and other promotional material, clear and conspicuous disclosure is made of the terms and conditions of the publication, distribution, and other material aspects of the continuity book series program. Such disclosure must provide adequate notice of the conditional nature of publication of the book series, *i.e.*, the fact that the book series is only planned and may not actually be published.

(3) If the decision is reached not to publish the book series, due notice is given to persons who have subscribed, within a reasonable time after the date of first mailing the solicitations for subscriptions. The Commission considers four months or less to be a reasonable time, unless extenuating circumstances exist. If the decision on whether or not to publish the book series has not been made within that time period, persons who expressed a desire to subscribe should be notified of the fact that a decision has not yet been reached, and should be given an opportunity to cancel their orders.

(4) There is no substitution of any books for those ordered.

This opinion is not intended to affect the application of any state law which places stricter requirements upon mail order marketers or affords greater protection to consumers.

As to the question regarding the legitimacy of sending the remaining volumes of a continuity book series in a bulk shipment to a subscriber after several volumes have been shipped and billed for singly, upon notice and an opportunity to reject the proposed bulk shipment before it is made, the Commission refers your attention to two recent consent orders: *Cadence Industries Corp.*, C-2508 (Mar. 25, 1974) [83 F.T.C. 1498], and *Crowell Collier and Macmillan, Inc.*, C-2394 (May 1, 1973) [82 F.T.C. 1292]. In these consent orders, the respondents agreed, among other things, to make no representations in promotional material that a participant in a continuity book program has the option of receiving each publication individually, at prescribed intervals, and accepting or rejecting it, unless such is the case. These consent orders also require a clear and conspicuous disclosure to be made in any advertisement promoting the book program of the conditions and terms of the program and the duties and obligations of any subscriber.

By direction of the Commission.

Memorandum to the File

Dec. 16, 1974

Because of questions which have arisen concerning the factual background underlying the proposed advisory opinion on the legality of dry-testing a continuity book series by mail order, further information was elicited today from Jacqueline Hunter, Vice-President of Wentworth Press, Inc. This memo sets forth information provided to me by Ms. Hunter.

Wentworth Press is an editorial packaging house engaging in the preparation of continuity book series for mail order marketers. Marketers enter into contracts with Wentworth which call for Wentworth to prepare the layout, select the type face and paper, and perform other editorial functions. Wentworth performs these services for both promotional material used to promote a book series and the actual book series itself.

In preparing the contracts with marketers, marketers have often discussed with Wentworth the possibility of dry-testing proposed continuity book series. Wentworth, though, is unsure of the legality under the Federal Trade Commission Act of dry-testing. Before Wentworth enters into such contracts, it would like to know whether

they would be permissible under the Federal Trade Commission Act, as interpreted by the Commission.

Dry-testing is considered by the applicant to be an efficient way of determining whether to market a continuity book series. It was once a common practice in the industry, but is not now because marketers are terribly unclear as to its legality.

A contract between Wentworth Press and a client, *i.e.*, a marketer/publisher, which would involve dry-testing is contemplated as a two-step contract. The first step would call for testing; it would encompass the editorial preparation necessary for the dry-test, involving preparation of material which comprises the mail order brochure. The second step would be the editorial packaging for the actual continuity book series; this step is activiated by a successful dry-test.

Some marketers test proposed book series by mail. Some advertise in various media.

The response forms which potential subscribers are furnished depends upon the particular marketer. Some marketers use forms which indicate to the recipient that he or she is subscribing to the book series by sending in the response, whereas others merely indicate an expression of interest on behalf of the responder.

Marketers use various mailing lists in testing their products. Generally, they will use a certain number of names from selected lists which they have obtained from various sources. The selected lists represent different prime targets. The tests enables the marketer to evaluate which sectors of the universe of potential subscribers is viable, and which aren't. After responses are received, projections can be made, and the feasibility of marketing the book series determined.

Marketers can generally evaluate whether it is viable to market the product or not within six weeks from the date of mailing solicitations. The components of this time period are as follows: One week elapses from the time the solicitations are mailed until they are all received. Responses are received within the next three weeks. Two weeks are needed to evaluate the responses.

Sixty days from the date of mailing solicitations or advertising is a bench mark figure within which marketers are able to assess the feasibility of marketing a product.* However, marketers sometimes prepare different solicitations. They may receive responses from some lists and not others, and may wish to pursue other names on responsive lists before committing significant resources to publishing and marketing a book series.

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* This time period was disputed by another industry source, in charge of the mail order division of one of the nation's largest and most prestigious publishing companies. He stated that a minimum of 90 days from the date of mailing a solicitation is needed to evaluate a dry-test. Informing subscribers of any decision reached would take additional time.

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Jeffrey S. Edelstein

MEMORANDUM TO THE FILE

July 31, 1974

Today I spoke with Jacqueline Hunter, Vice President of Wentworth Press, Inc., regarding the request for advice submitted by Mary Otto in her letter of May 6, 1974. I had called the company to clarify terms used in the request for advice.

Ms. Hunter informed me that a continuity book series is a set of multiple volumes sent in periodic mailings to customers that are generally related as to subject matter.

The basic question posed by Wentworth Press is: Can a marketer mail an offering (*i.e.*, brochure) nationally concerning a continuity book series without the books having been published? In "dry-testing" a series, the marketer enters into a conditional contract with the publisher; the contract to publish is conditioned upon the response to the offering. The sales solicitation, therefore, is made before the books being solicited have been published or are subject to an unconditional contract to publish.

Dry-testing is a practice which was apparently very common in the continuity book series mail order business at one time, but has recently fallen into disfavor because of widespread confusion over its legality. Ms. Hunter informed me there are no clear rules to provide guidance to marketers on this matter. Marketers are in need of clarification from the Commission because of the great confusion in the industry. At the same time, the mail order business is on the rise, which compounds existing problems.

On the basis of this conversation, I believe that the Commission should issue a formal advisory opinion to Wentworth Press in regard to the question of dry-testing.

Wentworth's second question involved "load ups" through the mail. In a load up situation, a customer might have ordered the first volume of a continuity book series one month, the second volume the next month, and the third volume the next month. Then the marketer informs the person that the remaining twelve volumes of the series are available and that if the customer desires, these volumes will be sent at once, with the customer billed for one volume each month. A load up, therefore, is the remainder of the set which is sent to the customer at one time but paid for per the original billing agreement.

Jeffrey S. Edelstein

Letter of Request

May 6, 1974

Dear Sir or Madam:

I am writing to you at the suggestion of David Paul in your New York office. We are a book packaging house and are about to embark on a continuity book series. We have conflicting sources of information about dry testing our series and would like to clarify the legality of dry testing a product through the mail. One source of information informed us that there is nothing illegal about this, however another advised us against doing so in accordance with your regulations. Mr. Paul said he knew of no such stipulation but that it should be verified with your office.

Could you also advise us on the legitimacy of "load ups" through the mail. If you have a pamphlet or brochure governing your regulations we would very much appreciate receiving one as soon as possible.

I look forward to your prompt response.

Sincerely,

/s/ Mary Otto

Marking of articles of jewelry made from alloy comprised of one-half gold of 14 karat fineness and one-half silver of at least 925/1000 fineness. (File No. 723 7007)

Opinion Letter

May 6, 1975

Dear Mr. Windman:

This is in response to your request for an advisory opinion regarding the marking of articles of jewelry made from an alloy comprised of one-half gold of 14 karat fineness and one-half silver of at least 925/1000 fineness. You question the correctness of a recent staff opinion concerning the marking of articles of jewelry made of such an alloy. We note at the outset that this staff opinion has been rescinded.

Although an advisory opinion might technically appear inappropriate pursuant to § 1.1 of the Commission's Rules of Practice, 16 C.F.R. § 1.1, the Commission has determined that a resolution of this issue by the Commission at this stage is desirable and accordingly has issued this opinion.

It is the Commission's understanding, on the basis of the representa-

tions made, that the alloy as described above is a combination of silver and gold in precise proportions for which a patent is being sought. The resulting alloy may have the general appearance of gold. The question is whether it may properly be identified by a marking "1/2 14K + 1/2 Ster."

The Commission is of the opinion that such a marking would violate the Guide for the Jewelry Industry, 16 C.F.R. § 23.22(c)(1) and 23.23(b). Under section 22(c)(1), only an article of jewelry composed throughout of not less than 10 karat fineness may be described as "gold." Under section 23(b) an article may not be described as "sterling" unless it is at least 925/1000ths pure silver. The marking "1/2 14K + 1/2 Ster.," accordingly, would be in violation of both of those sections of the Guide.

The Commission is of the view, however, that a nondeceptive and commercially acceptable designation and marking of this or other alloys of precious metals might be warranted in the public interest. To that end it has directed that the Bureau of Consumer Protection promptly study this question with a view toward possible amendment of the Guide, if appropriate.

By direction of the Commission.

cc: John J. Ghingher, III, Esquire
Weinberg and Green
Nineteenth Floor
10 Light Street
Baltimore, Maryland 21202

Letter from Office of General Counsel Rescinding Informal Staff Opinion

Mar. 24, 1975

Gentlemen:

This Office has determined, after further study of this matter, to rescind the informal staff opinion rendered to you and Mr. Robert Newman of B. F. Hirsch, Inc., by letters dated Sept. 9, 1974, and Oct. 11, 1974, which approved the marking "1/2 14K + 1/2 Ster.," for articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. It is now the view of this Office that the marking in question would violate the Guide for the Jewelry Industry, 16 C.F.R. Part 23. The marking in question would permit the use of the word gold to describe a product composed throughout of an alloy of gold less than 10 karat fineness. *See* 16 C.F.R. §§23.22(b)(2), (a)(1). In addition, it would permit the use of the word sterling to describe an alloy that is not 925/1000ths pure silver. *See* 16 C.F.R. § 23.23(b).

Rescission of the subject staff opinion by this Office is independent of any Commission action on the matter. However, in an effort to obtain formal resolution of the issues raised, including your petition for an amendment to the Guide for the Jewelry Industry, the matter will be presented to the Commission as expeditiously as possible. You will be promptly notified as to the Commission's determination.

Very truly yours,

/s/ Thomas H. Tucker
Assistant General Counsel

Third Supplemental Letter of Request

Feb. 12, 1975

Dear Mr. Tucker:

Thank you for your letter of Feb. 7. 1975, advising of the forthcoming determination of the Commission with respect to the staff opinions referred to above, which have been questioned by the Jewelers' Vigilance Committee, Inc. On behalf of our client, Metals and Jewels, we hereby submit to the Commission the following material for its consideration in determining whether the staff opinions in question were improper.

As a preliminary matter, we would like to address the statement contained in your letter of Feb. 7 to the effect that the use of the quality mark for which FTC staff approval was requested had previously been disapproved by the Jewelers' Vigilance Committee. One of the original inventors of the alloy, Seymour Globus, who is a principal in Metals and Jewels, did submit a sample of the alloy to Joel A. Windman, General Counsel of the Jewelers' Vigilance Committee on July 18, 1974. Mr. Windman responded, on July 25, 1974, that he had forwarded the sample for assay and that compliance with Commercial Standard CS51-35 would be required if the desired mark was to be employed. On Aug. 8, 1974, Mr. Windman reported to Mr. Globus the results of the assay, along with his analysis thereof, and concluded that the assay did not "definitively state that the product was not in fact originally made from 14K and sterling silver." Clearly, this conclusion does not amount to a "disapproval" by the Jewelers' Vigilance Committee. Copies of Mr. Windman's letters of July 25 and August 8 are attached hereto as exhibits. No further correspondence was received by our client from Mr. Windman and our client was not and is not aware of any formal action by the Committee approving or disapproving the use of the desired mark. Subsequent to Mr. Windman's correspondence as described above, he recommended orally

that our client seek an opinion from the Federal Trade Commission concerning the use of the mark and expressed his willingness to abide by whatever decision was reached by the Commission. Partly as a result of this recommendation, the client has instructed our firm to submit a request to the Commission for an advisory opinion.

As you are aware, our initial request was submitted on Aug. 30, 1974, and in that request, a copy of which is attached as an exhibit hereto, the background of the matter is set forth, along with a brief discussion of the relevant Commission industry rules. Pursuant to our initial request, Barry R. Rubin, Esq., of the Office of General Counsel, issued an informal staff opinion, dated Sept. 9, 1974, approving the use of the quality mark "Alloy 1/2 14K + 1/2 Ster." in connection with the alloy. Shortly thereafter, our client granted to B. F. Hirsch, Inc. the right to produce the alloy for sale to jewelry manufacturers. At the request of B. F. Hirsch, Inc., on Sept. 18, 1974, we asked for a second opinion from Mr. Rubin approving the use of the quality mark "1/2 14K + 1/2 Ster." because the quality mark originally approved by Mr. Rubin had proved too lengthy for use by jewelry manufacturers. A copy of our second request is also attached as an exhibit hereto. On Oct. 11, 1974, Mr. Rubin issued an opinion approving the use of this second mark. Since the second request, the original applicant, Metals and Jewels, Inc., has been liquidated, and its assets, including all rights to the alloy and the pending U.S. Patent applications covering the alloy, are now held individually by Edward Kohrn, Seymour Globus and C. D. Kaufmann, trading as Metals and Jewels.

In reliance on the informal staff opinions, very substantial amounts of money have been invested in testing of the alloy for production, the manufacturing of sample jewelry lines using the alloy and the advertising and promotion of the sale of articles of jewelry manufactured from the alloy. Wholesale sales of articles made of the alloy have exceeded $2,500,000 to date. There is every indication that the alloy will be a tremendous success in providing a high quality, low cost substitute for the currently employed gold alloys from 10 to 14 karats. Obviously, this success would be a tremendous boon to the jewelry industry, which has been seeking such a high quality, low cost alternative ever since the price of gold began its sharp climb. However, the value of the alloy as a viable alternative to existing low karat gold alloys depends to a very large measure on the ability of jewelry manufacturers to employ a quality mark denoting that the alloy is a combination of precious metals. Accordingly, a decision by the Commission to withdraw the previously issued informal staff opinions would have serious adverse effects not only upon our client and the jewelry manufacturers and

distributors who have invested heavily in the future of the alloy, but also upon the jewelry industry as a whole.

The legal question before the Commission is substantially identical to that posed in our initial request, that is, whether the use of the quality mark "1/2 14 K - 1/2 Ster." in connection with the alloy violates Sections 23.22, 23.23 or 23.25 of the rules adopted by the Commission as industry guides for the jewelry industry. 16 CFR §§ 23.22, 23.23, 23.25. These rules were initially adopted in 1957 to insure "the elimination and prevention of unfair trade practices to the end that the industry, the trade and the public may be protected from the harmful effects of unfair methods of competition, unfair or deceptive arts or practices, and other trade abuses." 22 F.R. 4567 (June 28, 1957). These rules, with a minor amendment in 1969, 24 F.R. 9581 (Dec. 1, 1959), have endured without substantial change since that time.

The first two rules, Sections 23.22 and 23.23, entitled "Misrepresentations as to gold content" and "Misrepresentations as to silver content," respectively, deal basically with markings or labels which may deceive the public as to the true character of articles made of gold and silver. The pertinent provisions of these rules attempt to deal with deception of two basic types. The first type of deception covered by these provisions is that caused by markings which misrepresent the extent of the presence of either gold or silver in the marked article. The applicable provisions addressing this first type of deception are as follows:

1. Section 23.22(a), which states the general rule that:

> (a) It is an unfair trade practice to sell or offer for sale any industry product under any trade or product name or designation or other representation having the capacity and tendency or effect of deceiving purchasers or prospective purchasers thereof as to the presence of gold or gold alloy in the product, or as to the quantity or fineness of gold alloy contained in the product, or as to the fineness, thickness, weight, ratio, or manner of application of any gold or gold alloy plating, covering, or coating on any industry product or part thereof.

2. Section 23.22(b)(2), which provides that one of the practices inhibited by the general declaration in 23.22(a) is:

> (2) Use of the word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is composed throughout of an alloy of gold, unless a correct designation of the karat fineness of the alloy immediately precedes the word "Gold," or abbreviation thereof, and such fineness designation is of at least equal conspicuousness therewith.

3. Section 23.23(a), which parallels Section 23.22(a), with respect to misrepresentations as to silver content:

> (a) It is an unfair trade practice to misrepresent in any way the silver content or fineness of silver content of any industry product * * *.

Because the marking proposed with respect to our client's alloy accurately states the presence, content and fineness of both the gold

and silver contained in the alloy, there can be little argument that the provisions of Sections 23.22 and 23.23 dealing with this first type of deception have been violated. It is undeniable that the proposed quality mark is not deceptive as to the primary metallic components of the alloy because the alloy is in fact composed of equal parts by weight of 14 karat gold and sterling silver.

The second type of deception at which Sections 23.22 and 23.23 are directed is not caused by inaccuracies or misrepresentations as to the degree of the presence of gold or silver in the article, but results from the possibility that the article marked "Gold" or "Sterling" may in fact be composed of a gold or silver alloy which, because of the excessive presence of base metals, does not possess the valuable properties associated in the public eye with the precious metal known as gold or sterling silver. The pertinent provisions of Sections 23.22 and 23.23 which address this second form of deception are:

1. Section 23.22(c) which provides that certain markings of products or parts of products will meet the applicable requirements. The pertinent marking is described in subsection (1):

> (1) An industry product or part thereof composed throughout of an alloy of gold *of not less than 10 karat fineness* may be marked and described as "Gold" when such word "Gold," wherever appearing, is immediately preceded by a correct designation of the karat fineness of the alloy and such karat designation is of equal conspicuousness as the word "Gold" * * *. (Emphasis added)

2. Section 23.23(b), provides a similar standard with respect to silver:

> (b) It is an unfair trade practice to mark, describe or otherwise represent any industry product, or part thereof, as "silver," "solid silver," "Sterling," or "Sterling Silver," unless it is at least 925/1,000ths pure silver.

These provisions reflect the judgment of the Commission and, presumably, the jewelry industry as a whole, as to the maximum proportion of base metals which can be alloyed with pure gold or pure silver without eroding the valuable properties of these precious metals. Their apparent objective is to prevent manufacturers of jewelry from marking as gold or silver an article composed of an alloy of one of those precious metals which, because of excessive dilution by base metals, does not possess the attributes publicly associated with the original precious metal.

It is significant that neither of the provisions addressing this second form of deception contemplates a situation such as the one at hand where two alloys, one clearly entitled under Section 23.22(c)(1) to the designation "Gold" and another properly the subject of the appellation "Sterling" under the standard of Section 23.23(b), are combined into a single alloy *which retains all of the valuable properties of a precious metal* and which, when properly labeled to accurately describe its

metallic content in conformity with the provisions dealing with misrepresentations of fineness, etc., can work no such deception on the public. In spite of the absence of the second form of deception in the proposed marking of our client's alloy, if the language of either Section 23.22(c)(1) or Section 23.23(b) is independently and literally applied to the alloy resulting from this combination of precious metals, it can be concluded that the alloy can be labeled neither "Gold" nor "Sterling," because the end product is not, under the literal application of Section 23.22(c)(1), "an alloy of gold of not less than 10 Karat fineness," and because the final alloy is not, under a strict application of Section 23.23(b), "at least 925/1,000ths pure silver." The ironic consequence of such an independent application of the literal terms of these sections would be that an alloying of two component metals, each independently entitled to designation as precious metals under these sections, produces a product which cannot be designated either "gold" or "silver" and, as a result, cannot be marked to disclose its true character as an alloy of these two precious metals. Indeed, the effect of such an interpretation would be to deprive the public of any accurate description of the metallic components of the product and to *conceal* the valuable properties of the alloy, a result which certainly is not consistent with the underlying intent of the applicable rules.

The third pertinent section of the rules governing the jewelry industry, Section 23.25, sets forth certain additional requirements for the use of quality marks on articles composed of a precious metal or an alloy thereof. The pertinent language of this section appears in subsection (a)(1), which declares it an unfair trade practice to sell, distribute or offer for sale any industry product bearing a quality mark which because of its location, because of its failure to identify the portion of the product to which it is applicable, or for some other reason, "has the capacity and tendency or effect of deceiving purchasers as to the metallic composition of the product or any part thereof." This language emphasizes the purpose of the rules to protect the public from the first form of deception, that is, deceptive markings which do not accurately describe the components of the articles to which they are attached. As stated earlier, because the proposed marking for our client's alloy accurately describes the component metals used in the alloying process, it can have no deceptive public effect.

In summary, the three pertinent sections disclose two independent standards of public protection. The first standard, articulated in Section 23.25 and in Sections 23.22(a), 23.22(b)(2) and 23.23(a), is aimed to protect the public from markings which misrepresent the presence of precious metals. The second standard, embodied in Sections 23.22(c)(1)

and 23.23(b) is directed to the use of a label or mark descriptive of the presence of a precious metal in articles which, because of the dilution of that precious metal by other base metals, do not possess the valuable qualities normally associated with that precious metal, regardless of whether the mark is accurate. The marking proposed by our client is not deceptive as to the metallic content of the alloy and clearly satisfies the first standard. In addition, because our client's alloy is a combination of two precious metals, it *retains the valuable properties of its component precious metals* and, therefore, does not deceive the public in the manner prohibited by the second standard. As pointed out earlier, however, the literal application of either section to the alloy could prevent the use of both "Gold" and "Sterling" as quality marks for articles composed of the alloy, since the language of those sections does not specifically consider alloys of *two* precious metals. Because the two basic standards of protection embodies in the rules are satisfied by the alloy and its proposed marking, denial of the proposed marking would not serve the underlying intent and purpose of the rules.

Accordingly, it is respectfully requested that the Commission interpret its rules in a manner consistent with their basic intent and with an awareness of the special qualities inherent in the alloy invented by our client. It is our conviction that this basic intent is satisfied by the special quality of the alloy and that the staff opinions issued to our client are consistent with such basic intent. We submit that the independent literal application of either Sections 23.22(a)(1) or 23.23(a) to a situation not contemplated by either such section will not serve the interest of the public or the jewelry industry as a whole and will have an extremely adverse effect upon our client and the other parties who have invested such significant amounts of time, effort and money in the development of the alloy. We respectfully request that the informal staff opinions issued to our clients be affirmed by the Commission.

If the Commission does not see fit to uphold the staff opinions issued to our client, we request that the Commission consider this letter as a petition for the promulgation of an amendment to the industry guide for the jewelry industry permitting the marking as a precious metal of articles manufactured from alloys, such as our client's alloy, which are made exclusively of component metals which, by themselves, would be entitled to marking as precious metals.

Sincerely yours,

s Howard B. Miller

/s/ John J. Ghingher, III

1173

Jewelers Vigilance Committee, Inc. Second Letter of Inquiry

Nov. 18, 1974

Dear Secretary Tobin:

Enclosed please find a copy of our letter to you dated Nov. 11, 1974 regarding use of the stamping "1/2 14K Plus 1/2 Sterling." Since writing to you, I have been advised that an informal staff opinion was rendered by Barry R. Rubin, attorney in the Office of the General Counsel to the effect that the stamping "1/2 14K-1/2 Ster." would be permissible in his opinion. The copy of his opinion letter is also enclosed.

On July 27, 1973, the Jewelers Vigilance Committee received an informal opinion from Attorney, Joseph P. Dufresne, also in the Office of the General Counsel, which stated, in part, that quality stamping gold of less than 10K fineness would be prohibited and

> it would be inappropriate to submit a request for an advisory opinion to the Commission as to whether the description "6K" or "6Kt" might be used.

This conclusion was reached because he referred to the *Trade Practice Rules for the Jewelry Industry* and *Commercial Standards* and stated:

> Gold articles containing gold of less than 10K fineness may not bear a quality mark.

Also, he concluded that the Commission would not sanction use of descriptions such as "1/4 Gold" or "Quarter Gold."

Finally, we are also enclosing a copy of another opinion letter from Mr. Defresne also dated July 27, 1973 to Mr. Arthur Altman on use of designations "1/4 Gold" or "Quartergold." You will note in this letter, which is not as legible as the others, he has stated:

> * * * such designations would be offensive because they easily could give the impression that the item contains more gold than it, in fact, does. Purchasers have become "educated" to the numerical karat designations. What you propose in contrast, is a significant departure from what has been in use for many years. It is very questionable whether the quality of the item would measure up to the expectations the designations would generate.

In light of the above contrary informal staff opinions, two dated July 23, 1973 and one Oct. 11, 1974, our letter of Nov. 11 requesting the Commission review the matter of stamping something "1/2 14K Plus 1/2 Sterling" becomes all the more imperative. A four-billion dollar industry has now been placed in the uncertain position reflecting upon its stability which governed it, at least since the days of the Commercial Standards in the mid 1930's.

It should further be noted contrary to Mr. Rubin's opinion permitting the stamping abbreviation of the mark "ster.," the *Commercial Standards* dealing with markings of items containing jewelry, CS 118-34 states:

> The terms "sterling" and "coin" shall not be abbreviated. * * *

Finally, unless a decision concerning this marking is reached, fractional marking of gold and silver will become commonplace and the properties and qualities one expects from noble metals will, in turn, be affected.

Once again, I will make myself available to the Commission together with any experts which may be necessary for the Commission to seek a fair and equitable decision in the matter.

Sincerely,

/s/ Joel A. Windman
General Counsel

Jewelers Vigilance Committee, Inc. First Letter of Inquiry

Nov. 11, 1974

Charles Tobin
Secretary
Federal Trade Commission
Washington, D.C. 20580

Dear Secretary Tobin:

A firm by the name of Metals and Jewels, Inc. located at 1316-1318 W. Lexington St., Baltimore, Md. has a patent pending for a gold alloy comprised of 50 percent 14K gold and 50 percent sterling. They are now attempting to market this patent-pending alloy as "One-Half 14K Plus Sterling" to the trade.

They have initially asked us for our opinion whether or not a metal so composed would conform to the U. S. Department of Commerce Commercial Standard CS 51-35, "Marking Articles Made In Silver In Combination With Gold," a copy of which we enclose herein as well as with the Federal Trade Commission *Trade Practice Rules for the Jewelry Industry*, Rules 22 and 23 as well as the provisions of the *National Gold and Silver Marking Act*, 15 U.S.C., 29, *et. seq.*

We had a sample of this alloy assayed and found the gold content of the alloy to be a little over 7K and the silver to be 481.3 parts per thousand fine silver. Accordingly, we notified this firm that it was our belief that their alloy could not be stamped 14K gold and sterling in accordance with any of the aforesaid laws and/or rules.

The Commercial Standards dealing with combinations of silver and gold which they are referring to is subdivision 3(b). Please note, however, that subdivision 5(c) states:

> No quality mark indicating the presence of gold shall be applied to articles (made of sterling silver in combination with gold) composed in part of gold less than 10K fineness.

Further, Rule 22c(1) states that:

> An industry product or part thereof composed throughout of an alloy of gold of not less than 10K fineness may be described as "gold" * * *

Accordingly, although the alloy may have initially been composed of 14K gold, its "composition throughout" is only one-half of the required stamping and below the 10K minimum, and, therefore, allegedly in violation of the rule. Further, according to the *National Gold and Silver Marking Act*, the stamping would allegedly be a violation since its "actual fineness" is allegedly less than the tolerances provided for 14K gold.

Further, referring to the one-half "sterling," the Commercial Standards, paragraph 5(b) states:

> No article containing metal or metals other than sterling silver and gold * * * shall have applied to it the quality marks as proscribed in paragraph three and four herein.

Since the composition indicates the silver content to be 481 parts per thousand fine silver, it would allegedly not be "sterling" which is 925. Along these lines, Rule 23 of the Federal Trade Commission Rules states:

> It is an unfair trade practice to mark, describe, or otherwise represent an industry product or part thereof * * * "sterling" unless it is at least 925/1,000 pure silver.

Further, the prohibition of the *National Gold and Silver Marking Act* would allegedly apply here as well.

The Commercial Standard, as you will note from reading them, deal with articles combined with silver and gold applied to jewelry in which the parts were made of two separate metals either entirely sterling in one part and entirely of a karat gold above 10K in the other part, or to gold which was mechanically bonded to sterling (gold filled on sterling) or where white gold, a minimum of 1/20 of the weight was bonded to sterling, and the metals could not be easily distinguished. The framers of this Commercial Standard specifically use the words "silver *in combination* with gold," the word "combination" meaning the bringing together of articles already composed of sterling and karat gold of not less than 10K. It did not mean an "alloy" of silver and gold, for as the definitions state:

> (c) "gold" means 24 karats gold or any *alloy* of the element gold of not less than 10K fineness.
>
> (c) "sterling or "sterling silver" means an *alloy* of 925/1000 parts pure silver within the tolerances permitted by the National Stamping Act.

Thus, they are talking about a combination of metals already alloyed to their legal minimum and not an alloy of sterling and gold which would be a reduction from said legal minimum.

Further, the framers of the Commercial Standards specifically provided for alloys in Commercial Standard CS 67-38, "Marking Articles Made of Karat Gold," CS 118-44, "Marking of Jewelry and Novelties of Silver," CS 47-34, "Marking of Gold Filled and Rolled Gold

Plate Articles Other Than Watchcases," and CS 66-38, "Marking of Articles Made Wholly Or In Part of Platinum." Thus, it is believed that all alloys are adequately covered, namely, those providing for the minimum silver requirements of 925 and the minimum karat requirements of 10K in conformance with the *National Gold and Silver Marking Act.*

We had notified this firm, Metals and Jewels, Inc., of our conclusion and stated, since we believe promotion of the product would allegedly mislead, they should seek an advisory opinion from the Commission, since our findings would not necessarily be conclusive.

In the interim, we have found the firm is allegedly promoting its products to members of the trade and next month, in one of the trade publications, an alleged licensee will promote use of this mark. Enclosed is a photocopy of an advertisement that has appeared in the trade press, specifically the *Jewelers' Circular-Keystone* on page 105 in their November 1974 issue. To our knowledge, the product has not been sold.

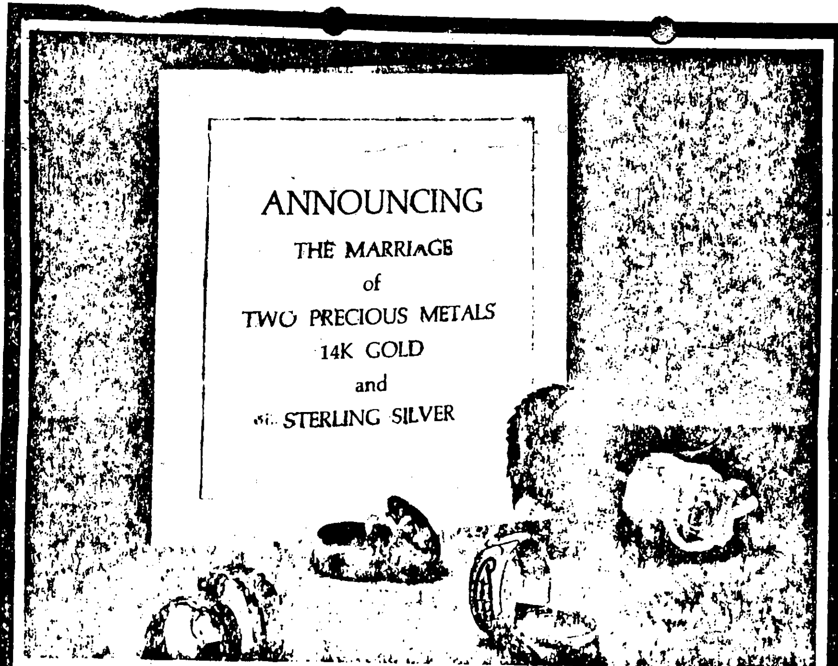
Accordingly, it is imperative that the Commission review this matter to disseminate whether or not this marking would allegedly mislead the consumer who will ultimately be purchasing this product. Failure to do so at this time would lead others, for example, to allegedly manufacture alloys one-quarter silver, one-quarter 10K gold which would assay 2K and accordingly open a "Pandora's Box" to an industry which has attempted to live with Commercial Standards and within Rules and Guides promulgated by the Commission.

I will make myself available to the Commission together with any experts which may be necessary for the Commission to seek a fair and equitable decision on this matter.

Respectfully,

/s/ Joel A. Windman
General Counsel

1173



A New Gold Alloy*
Retailing for Much Less Than 14K

They said it couldn't be done, but here it is! The A. H. Pond Company now offers STARFIRE Wedding Rings in a brand new gold alloy for up to 40% less than their 14K counterparts. A remarkable new manufacturing process combines 14K gold and sterling silver in approximately equal parts. Rings made of this beautiful marriage of two precious metals look and feel like 14K. Customers who might otherwise be forced to settle for lesser quality can now get solid, full-weighted rings at substantial savings.

*Alloy 1/2 14K + 1/2 Sterling—patent pending 480,890

PRODUCED BY Keepsake

Staff Letter of Response

Oct. 11, 1974

Dear Mr. Newman:

This is in response to John J. Ghingher, III, Esquire's letter of Sept. 18, 1974, requesting a further staff opinion on behalf of his client, Metals and Jewels, Inc. In my letter to him of Sept. 9, 1974, I rendered an informal staff opinion to the effect that labelling of his client's product "Alloy 1/2 14K + 1/2 Ster." would not violate any of the laws administered by the Commission.

It is my understanding that Metals and Jewels, Inc. has granted to B. F. Hirsch, Inc. the right to produce articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. B. F. Hirsch, Inc., now proposes to use the quality mark "1/2 14K - 1/2 Ster." This mark would be displayed in type of sufficient size as to be legible to persons of normal vision and will be inscribed in a place likely to be observed by prospective purchasers. The word "alloy" would be dropped from the description because it would not be feasible to inscribe such a long phrase on most jewelry items.

As long as the above conditions are met, I do not believe that the new proposed description would violate any of the laws administered by the Commission. I do not think that the term "alloy" would add anything to the proposed disclosure. Please understand that the foregoing does not constitute an advisory opinion of the Commission. If you have any questions, please call me at (202) 963-5089.

Very truly yours,

/s/ Barry R. Rubin
Attorney

cc: John J. Ghingher, III, Esquire
Weinberg and Green
10 Light Street
Baltimore, Maryland 21202

Second Supplemental Letter of Request

Sept. 18, 1974

Dear Mr. Rubin:

Recently you were kind enough to provide us with an informal staff opinion with respect to the marking of articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. We had requested, on behalf of the above client, an opinion that the marking of

this alloy with the quality mark "Alloy 1/2 14K + 1/2 Ster." would not violate any rule or regulation of the Commission applicable to the jewelry industry. By your letter of Sept. 9, 1974, you rendered an informal staff opinion to this effect.

Since that time, our client has granted to B. F. Hirsch, Inc. the right to produce the alloy for sale to manufacturers of jewelry. Hirsch has advised us that it is highly impractical for a manufacturer of jewelry to employ such a lengthy marking. Because of the small size of articles of jewelry, the marking that we had requested would impose severe restrictions upon the design possibilities for such articles and would therefore greatly restrict the marketability of the alloy.

For the above reasons, we request that you render a second informal staff opinion that use of the quality mark "1/2 14K - 1/2 Ster." will not violate any of the laws administered by the Commission. This quality mark will be displayed in type of sufficient size as to be legible to persons of normal vision and will be inscribed in a place likely to be observed by prospective purchasers. The mark is not currently being used and the use of the quality mark is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

In support of my request I refer you to the "Background" and "Discussion" sections of the letter dated Aug. 30, 1974 wherein Howard B. Miller and I submitted the original request on behalf of this client. I have enclosed a copy of that letter for your convenience.

I would greatly appreciate your addressing your opinion to Mr. Robert Newman, Vice President, B. F. Hirsch, Inc., 100 Avenue of the Americas, New York, N.Y., with a copy to me. If you have any questions or if I can provide any assistance, please do not hesitate to call me at 293-1807 on the District of Columbia exchange.

Thank you once again for your very kind cooperation in this matter.

Sincerely yours,

/s/ John J. Ghingher, III

Staff Opinion Letter

Sept. 9, 1974

Gentlemen:

This is in response to your letter of Aug. 30, 1974, requesting an advisory opinion from the Commission regarding the proper labelling of jewelry composed of an alloy of gold and silver. Since you requested that this matter be handled as expeditiously as possible, this letter is of

necessity only an informal staff opinion and does not constitute an advisory opinion of the Commission.

It is my understanding that your client, Metals and Jewels, Inc., will market articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. These articles would have the same appearance as articles manufactured entirely of 14 karat gold. Your client proposes to imprint these articles with the following description: "Alloy 1/2 14 K + 1/2 Ster." This mark will be displayed in type of sufficient size as to be legible to persons of normal vision and will be inscribed in a place likely to be observed by prospective purchasers.

As long as the above conditions are met, I do not believe this description would violate any of the laws administered by the Commission. Please understand that the foregoing does not constitute an advisory opinion of the Commission. If you have any questions, please call me at (202) 963-5089.

Very truly yours,

/s/ Barry R. Rubin
Attorney
Office of General Counsel

Letter of Request

Aug. 30, 1974.

Dear Sir:

On behalf of Metals and Jewels, Inc., a District of Columbia corporation, I hereby request an advisory opinion with respect to the following proposed course of action:

Background

Edward L. Kohrn and Seymour Globus conceived an invention consisting of an alloy of 14 karat gold and sterling silver, combined in equal parts. Messrs. Kohrn and Globus have applied for letters patent covering their invention and have assigned such application, and any letters patent which may issue thereon, to Metals and Jewels, Inc. Metals and Jewels, Inc. proposes to produce and sell quantitities of the alloy for use in the manufacture of articles of jewelry. Custom and usage in the jewelry industry is such that in order to sell quantities of the alloy to jewelry manufacturers, Metals and Jewels, Inc. must provide said manufacturers with assurances that articles of jewelry composed of the alloy may be stamped with a quality mark indicating that such article is composed throughout of an alloy of precious metals.

Proposed Course of Action

It is proposed that articles of jewelry manufactured from the alloy described above and composed throughout of the alloy be imprinted with the quality mark "Alloy 1/2 14 K + 1/2 Ster." The quality mark will be of sufficient size type as to be legible to persons of normal vision and shall be so placed as likely to be observed by purchasers or prospective purchasers. There will be no difference in the size of letters or words within the quality mark.

Discussion

The general rules applicable to the proposed course of action are set forth in Title 16 of the Code of Federal Regulations particularly in Sections 23.22, 23.23 and 23.25 thereof. Those sections deal with misrepresentations as to the gold and silver content of an article of jewelry and the use of quality marks with respect to the composition of articles composed of precious metals and alloys thereof. It is submitted that use of the proposed quality mark will not misrepresent the gold content of the article of jewelry, will not misrepresent the silver content of said article and will not deceive purchasers or prospective purchasers of the article as to the metallic composition of the article. Attached is the report of Robert B. Pond, Jr., Ph.D., analyzing an assay of the alloy. Dr. Pond concludes that the assay is consistent with the description of the alloy as being composed of equal parts of 14 karat gold and sterling silver. Based on Dr. Pond's findings, use of the quality mark described above accurately represents the gold and silver content of the alloy and will not in any way deceive a purchaser of an article composed of the alloy as to the metallic composition thereof.

Request for Advisory Opinion

Metals and Jewels, Inc. hereby requests that the Commission issue an advisory opinion that the course of action proposed, on the basis of the facts submitted, will not violate any rule or regulation of the Commission applicable to the jewelry industry. The course of action is not currently being followed by the requesting party and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

If any questions arise concerning this request for an advisory opinion, please call the undersigned at 293-1807 (on the District of Columbia exchange). A conference is respectfully requested if the Commission is considering an advisory opinion that the proposed course of action may not be implemented.

Sincerely yours,

589-799 O - 76 - 78

/s/ Howard B. Miller

/s/ John J. Ghingher, III

Attachment to Letter of Request

Aug. 29, 1974

Dear Sirs:

I have examined the report which you furnished of a "Birmingham" assay of a metal alloy allegedly produced by mixing 14kt gold and sterling silver in equal parts by weight.

I intend to show that the assay confirms that the alloy sample contains gold and silver in quantities consistant with a mixture of 14kt gold and sterling silver in equal parts by weight.

1. Note that the original 14kt gold must have contained not less than 14/24ths. or 585/1000 parts gold by weight.

2. The original sterling silver alloy must have contained not less than 921/1000 parts silver by weight.

The weight fractions of gold and silver in a mixture of 14kt gold and sterling silver in equal parts by weight would be one half the original fractions. Therefore the final alloy must be composed of not less than

3. 1/2x585/1000 = 292.5/1000 parts gold by weight, and

4. 1/2x925/1000 = 462.5/1000 parts silver by weight.

The assay reported:

117.2mg gold
187.93mg silver
390.5mg total

The weight fraction of gold from the assay is

5. 117.2mg gold/390.5mg total = 300.1/1000 parts gold by weight.

This is greater than the minimum gold requirement of 292.5/1000(#3).

The weight fraction of silver from the assay is

6. 187.93mg silver/390.5mg total = 481.25/1000 parts silver by weight.

This is greater than the minimum silver requirement of 462.5/1000 (#4).

By these calculations it is evident that the final alloy can be described exactly as being produced by mixing one half 14kt gold and one half stirling silver by weight.

Respectfully submitted,

/s/ Robert B. Pond, Jr., Ph.D.

Possible conflict, as to notice requirements, between State law and FTC's Trade Regulation Rule Concerning A Cooling-Off Period for Door-to-Door Sales (16 C.F.R. 429) (File No. 753 7009)

Opinion Letter

May 20, 1975

Dear Mr. Feldman:

This is in response to your request for an advisory opinion regarding conflict, as to notice requirements, between State law and the Federal Trade Commission's Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales. The question posed is: Would printing of both the notice of the buyer's right to cancel a door-to-door transaction specified in the Commission's Rule and any such notice required by State statute or municipal ordinance, identifying one as the Rule and the other as State law, violate the Rule where the statute or ordinance involved prescribes a mandatory form of notice which in some respects may be incompatible with the form of notice prescribed by the Rule?

It is the Commission's understanding, based upon the information submitted, that you have requested the opinion for your own guidance and on behalf of the Major Finance Corporation, a company engaged in purchasing commercial paper from door-to-door sellers. Pursuant to your advice, the company proposes to require door-to-door selling companies from which it purchases commercial paper to include in contracts for transactions subject to the Commission's Rule both the notice of the buyer's right to cancel required by State law or municipal ordinance and the notice specified in the Commission's Rule, identifying one as the Rule and the other as State law.

The Commission has no objection to the inclusion in such contracts of both the notice required by State law or municipal ordinance and the summary notice specified in the Commission's Rule, identifying one as the Rule and the other as State law, as long as any language in the State or municipal notice directly inconsistent with the Rule is stricken. Since the Commission's rule gives the consumer a unilateral right to cancel a transaction within three days, without penalty or fee, language in a State notice misinforming the buyer of the existence of a penalty or fee (*i.e.*, "If you cancel, the seller may keep all or part of your cash down payment") is directly inconsistent with the Rule and, if included in the sales contract or receipt, must be stricken. Moreover, since the buyer's right to cancel transactions covered by the Rule is not limited

to agreements solicited at or near the buyer's residence, does not require the buyer to furnish any reason for cancellation, and may be exercised by mail or delivery of any written notice or telegram, any language to the contrary in a state notice is similarly directly inconsistent with the Rule. Any other language in a state notice, the effect of which is to misrepresent in any manner the buyer's right to cancel under the Commission's Rule, must be omitted or stricken because directly inconsistent with the Rule. However, language in a State notice which informs buyers of State-created rights in addition to those conferred upon them by the Rule, or informs them how to be entitled to those rights, may be included in new contract or receipt forms, and retained in existing forms without being stricken.

Cognizant that providing both the summary notice required by the Rule and the notice required by State law could result in needless duplication in a contract, the Commission would not object to a seller using a composite notice containing elements of both the Rule's notice and the State notice, provided that the composite notice expressed no restrictions or limitations upon the buyer's right to cancel which are not contained in the Commission's Rule. A composite notice must also inform the buyer of a right to cancel at least as extensive as that described in the Commission's prescribed summary notice, including reference to the Notice of Cancellation form which must be attached to the contract.

By advising that it would not object to use of both the summary notice prescribed by the Rule and that required by State law, with inconsistent State language stricken, or to use of a composite notice, the Commission, of course, does not intend to raise the implication that sellers may not use only the form of summary notice prescribed by the Rule, where this would also satisfy State requirements. The Commission is aware of the difficulty imposed upon sellers who are subject to inconsistent State and Federal legal obligations. In the interest of national uniformity, the Commission continues to encourage the States to eliminate or change the requirements of their laws which are inconsistent with the Rule, to the extent that they provide less protection to consumers. The Commission also encourages those states with a specified form of notice expressing restrictions or limitations which are not contained in the Commission's Rule to consider use of contracts with only the notice prescribed by the Rule as satisfying State notice requirements, because it is the Commission's opinion, shared by numerous State and local officials who have consulted with the Commission, that the Rule's notice provides the buyer with the essential information concerning his or her unilateral right to cancel.

Whether the notice of the buyer's right to cancel prescribed by the

Rule is printed alone, in a composite form, or in addition to the state notice, the Rule's notice must be given in substantially the form specified and must comply with the minimum size and placement requirements of the Rule.

The Commission would consider it to be a violation of its Rule if a completed receipt or contract pertaining to a sale subject to the Rule contained only a state-required notice if that notice did not inform the consumer of his or her unilateral right to cancel a transaction within three days, without penalty or fee, and appropriately refer to the attached Notice of Cancellation form for an explanation of that right. With enactment of the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, the Rule extends to door-to-door transactions, as defined in the Rule, in or affecting commerce.

The basis of the Commission's opinion is that trade regulation rules have the force and effect of law, and, like other substantive federal administrative regulations, preempt conflicting State law. The Commission's Cooling-Off Rule preempts State laws and municipal ordinances to the extent that they do not accord the buyer the same or greater right to cancel a door-to-door sale than that provided by the rule, as well as State-required notices to the extent that they do not provide notice of the right to cancel the transaction in substantially the same form and manner as the summary notice set forth in the rule. By including in a contract for a transaction covered by the rule a State-required notice of cancellation rights containing language directly inconsistent with the provisions of the rule, the buyer would be misinformed of his or her right to cancel under the rule and the full effectiveness of the rule would be frustrated.

The Commission emphasizes that the coordinated efforts of both the Commission and State and local officials are essential in providing the consumer with an effective right to cancel door-to-door transactions within a cooling-off period. The Commission's opinion that language in a State summary notice should be stricken if directly inconsistent with the provisions of the Commission's rule is not intended to annul or diminish any rights and remedies provided to consumers by State law and enforceable thereunder.

By direction of the Commission.

Letter of Request

June 3, 1974

Gentlemen:

This office represents Major Finance Corporation and its subsidiaries (the "Company"), a company engaged (among other lending and

financing operations) in purchasing commercial paper from door-to-door sellers in the Washington, D.C. metropolitan area (including nearby Maryland and Virginia areas). This request for advisory opinion is made on behalf of the Company and for our own guidance in the light of the facts set forth below.

The facts. The Company requested our opinion concerning conflict of State (Virginia, Maryland and the District of Columbia) laws (the "statutes") with the Rule and methods of compliance with the Rule and the statutes. After studying the statutes and the Rule and discussions with state enforcement authorities, we advised our client as is set forth in a copy of our opinion letter, annexed hereto as Exhibit I.

On May 30, 1974, the undersigned received a telephone call from a member of your legal staff, Ms. Anne Fortney, who advised the undersigned that she had learned of our opinion and recommendations from a seller of commercial paper to the Company; that if the Company should adopt our recommendations to print, or require printing of, both the notice required by state statutes and the Rule, the F.T.C. would immediately bring suit against our client to require removal of statutory notices required by the States and for other unspecified violation(s) of the Rule, all on the ground that the addition of mandatory state notices would be contrary to the Rule, which she vehemently asserted supersede, annul and repeal all statutes in conflict therewith [notwithstanding the provisions of note 2(b) of the rule]. The undersigned informed Ms. Fortney that this office could not accept her opinion; that we were aware of possible changes in the statutes which would permit the use of only the notice required by the rule (which, in the case of Maryland, has occurred); and that until such time as such changes should occur, we believed we had no alternative but to advise our clients as set forth in Exhibit I hereto. Ms. Fortney again threatened action against our client and after a somewhat difficult conversation, the undersigned requested that he be transferred to your General Counsel's office. After discussion that day (May 30, 1974) and on June 3, 1974 with Mrs. Mary Foldes, who, incidently, is more moderate and understanding in her approach to the problem and who has been both helpful and gracious, we have decided to request the Commission's opinion with respect to the conflict of laws problem which presently exists. We respectfully call your attention to the fact, adequately set forth in Exhibit I hereto, that the Company desires only to be in compliance with, and to have all sellers of commercial paper to it in compliance with, all applicable law. The Company does not desire to make test cases or become engaged in unnecessary litigation with the Commission or any State authority.

The basis of our opinion. We acknowledge that under present law

and recent court decisions, rules of the Commission have the force and effect of law and must be complied with, where applicable. We do not acknowledge that a Commission rule can invalidate or repeal a State statute or a specific Act of Congress in its capacity as the legislative branch of the District of Columbia Government. State court (including in such term the District of Columbia) judges are obliged to enforce the laws of their respective jurisdictions (or in some cases, the jurisdiction wherein the transaction arose) and cannot simply defer to Federal rules, regulations or law unless the State law is unconstitutional or the matter involves interstate commerce, as to which the Federal law would generally be superior. It is impractical to think that in an area such as the Washington, D.C. metropolitan area, involving three jurisdictions, a door-to-door seller could make a proper decision as to the use of separate forms, one complying solely with Federal law (on the ground that Federal law is superior since interstate commerce is involved) and one complying solely with State statute (on the ground that the transaction is solely intra-State). Where a Commission rule and a state statute are in conflict with each other and both are applicable to our client, we see no alternative but to recommend compliance with both, which can be done in the instant situation, by simply not enforcing certain rights under State statutes, *e.g.*, retention of the deposit under the Maryland statute. We believe that this is the thrust and force of note 2(b) of the rule.

Request for opinion. Your opinion is respectfully requested as to the following matters:

Will *printing* of both the notice required by the rule and the notice required by statute (see Exhibit I recommendations as to the District of Columbia, Maryland being no longer a problem), identifying one as the rule and the other as State law, violate the provisions of the rule where the statutes involved prescribe a mandatory form of notice and that form of notice is incompatible with the form of notice prescribed by the rule?

We respectfully call to your attention our advice to our client to the effect that it is not to enforce provisions of State law which are less favorable to the consumer than the provisions of the rule, and vice versa if such situation should exist. Accordingly, the foregoing request is not to be interpreted as seeking an opinion which would permit the making of charges or use of other provisions of State law which are in conflict with the rule and less beneficial to the consumer; nor should it be interpreted as a request for permission to omit the notice of cancellation required by the rule, since we have advised our client to see to it that such notice of cancellation is provided in accordance with the rule.

Your early response will be appreciated. Pending such response, we have advised our client to follow our recommendation with respect to the District of Columbia and to follow the Rule only in both Virginia and Maryland.

Respectfully submitted,

FELDMAN & ECKER

/s/ Melville W. Feldman

Exhibit I - Attachment to Letter of Request

May 17, 1974

Dear Mr. Sturt:

At your request, we have reviewed the statutes of Maryland, Virginia and the District of Columbia for inconsistencies with the Rule, which becomes effective June 7, 1974. We are informed that you have copies of the Rule and all statutes to which reference is hereinafter made and accordingly, will not here set out each notice required by the Rule and each statute. We will, of course, furnish the same upon request.

The Facts

The Rule requires that a notice of the buyer's right of cancellation be printed in 10 point bold face type in immediate proximity to the space reserved in the contract for the signature of the buyer, as well as other requirements which we will not here repeat.

The Maryland Annotated Code, Article 83, Sections 28 through 35 (the "Home Solicitation Sales Act") covers, essentially, the same subject. Sections 30(2)(A) and (B) contain the form of notice of buyer's right to cancel required under Maryland law.

The Virginia Code, §§59.1-21.4, 59.1-21.5 and 59.1-21.6, essentially cover the same subject, buyer's right to cancel notice requirements being contained in §59.1-21.4(b).

The District of Columbia Code (1973 Edition), §28-3811, covers "home solicitation sales" in much the same manner as the Maryland law. Required buyer's right to cancel provisions are contained in §28-3811(g)(2).

Only the Rule prescribes the form of notice of cancellation which must be delivered to the buyer for his use in case of his desire to exercise his right of cancellation. Local statutes permit any form of notice of cancellation and do not require delivery of a form for such use.

The Notice of Right of Cancellation.

Virginia. There is no problem, either as to criminal penalty or civil penalty. §59.1-21.4(b)(ii) specifically provides that a notice given pursuant to federal law which contains at least the information prescribed by the notice specified in §59.1-21.4(b)(i) and which is not in conflict with the Virginia law may be used in lieu of the prescribed notice. We are of the opinion that the notice prescribed by the rule will satisfy the requirements of the Virginia Code inasmuch as the notice and notice of cancellation prescribed by the rule contain more information, are not inconsistent with, and are more protective of the buyer than the provisions of the Virginia Code. *Recommendation:* Use the notice suggested by the rule.

Maryland. The notice prescribed by the Maryland law (see reference above) is mandatory and explicit. The Maryland Attorney General's Office (Miss Stevans) has orally advised that the attorney general will request a change in the Maryland law which will adopt the requirements of the rule and that the attorney general will not seek to enforce any criminal penalties where there is compliance with the rule. This leaves two practical problems: (1) Since the attorney general's opinions are not binding upon the courts of Maryland or elsewhere, a court of Maryland might, upon complaint by a county attorney, impose the penalty of up to $500 prescribed by Section 33; and (2) in any suit to enforce a contract, a court (either in or out of Maryland) might find that there had not been compliance with Maryland law and that, therefore, the civil penalty of retention of the goods by the buyer [Section 31(4)] should be enforced. The "door-to-door" definition under Maryland law relates to sales made in the home, while the definition under the rule is much more broad. Accordingly, at this time we have no choice but to advise you that in our opinion you should comply with both the rule and Maryland law. *Recommendation:* You should print the notices required by both the Maryland statute and the rule, identifying one as "Maryland Law" and the other as "Federal Law." The only alternative would be to follow the requirements of the rule, risking the civil penalty of the Maryland law in cases where it might arise. We do not, in all candor, consider that, practically-not legally, there is any real risk of criminal penalty for failure to adhere to the exact notice requirements of the Maryland law, if the rule is followed. This basically entails a business risk decision as to the number of situations or cases in which the civil defense might be raised prior to amendment of the Maryland law-if and when amended.

District of Columbia. The notice required by the District of Columbia law (see reference above) is mandatory and explicit. It is similar, but

not identical (*e.g.*, the notice requirements are slightly different) to the Maryland law and the basic principles of law are the same as we have set forth with respect to Maryland law. Mr. William Robinson, Chief of the Legislative Opinion Division of the Corporation Counsel's Office of the District of Columbia (similar to Attorney General's Office in Maryland) has orally advised that: his office has been requested to comment on the rule; his office is aware of the notice requirement inconsistency (*i.e.*, the rule is more broad than the D.C. notice requirement); no steps have been taken toward revision of the D.C. law; and, in *his* opinion the District of Columbia would not seek to enforce the D.C. law if there is compliance with the rule, notwithstanding that the D.C. law is enacted by the Congress of the United States and, as a general rule of law, would supercede and be superior to any regulation of a Federal agency (the F.T.C. in this case). Restating, the same principles as are applicable in Maryland, the Corporation Counsel of the District of Columbia does not make or judge the law; he is basically the prosecutor of criminal violations of the District of Columbia law. Judges decide the law and if the Corporation Counsel's office was pressed hard to file a complaint, the judicial decision might well be one with which that office was not in sympathy. Secondly, that office has no control over, or even jurisdiction to be a party to, the civil aspects of any case wherein the buyer might raise a defense or counterclaim based upon non-compliance with the D.C. law. It is very practical to think that the courts might, in these days of "consumer protection," take the strict legal view in order to relieve a buyer of his obligation to pay, finding non-compliance with the D.C. statute, which, as already stated, would normally be superior to the rule of a Federal agency. According, we have no choice but to state that in our opinion you should comply with both the D.C. statute and the rule. *Recommendation:* Print both notices, in the same manner as we have recommended for Maryland contracts. The same alternative is available to you, based upon your business judgment as to risk.

The Notice of Cancellation.

As hereinabove stated, only the rule prescribes the form of notice of cancellation which you must give to the buyer. By its terms, it is more broad and protective of the buyer than the law of Maryland, which, for example, allows a cancellation charge under certain conditions [Section 31(3)], and is in other respects more beneficial to the buyer than both the D.C. and Maryland laws. It is our opinion that you must, in order to comply with the rule, supply to the buyer a notice of cancellation in the form prescribed by the rule. Regrettably, unless you wish to argue, in each case which may arise, that the particular contract in question is

not subject to the rule, but only to the state law (*i.e.*, Maryland, Virginia or the District of Columbia), you will be bound by the more broad protective aspects of the rule (*e.g.*, you will not be able to charge the fee allowed by Section 31(3) of Article 83 of the Maryland law). This could be the subject of a lengthy, legal discourse, but we do not consider it practical to review the whole subject of whether a particular contract is subject to the rule because it was or was not an interstate or intrastate transaction, or whether, regardless of that answer, the company (you) and/or the seller are so engaged in, or affect, interstate commerce as to require the application of the rule, etc., etc. As a practical matter, operating in this metropolitan area of three separate jurisdictions, we are of the opinion that the buyer will "have the best of all worlds;" namely the best advantages of both the rule and any other or additional advantage which he may find under local law.

General.

We are not unmindful of the practical problems created by the foregoing opinions and recommendations.

For example, we have sought a means by which we could recommend to you some sort of "combination" notice of buyer's right to cancel. In this connection, the rule is not as rigid as the laws of Maryland and the District of Columbia, permitting a statement "substantially" in the form suggested. Unfortunately, both the Maryland and the D.C. law do not permit "substantial" compliance and the prescribed forms would, in fact, limit or reduce the effect of the notice "suggested" by the rule. Conversely the notice required by the rule cannot be limited to a notice concerning sales "at your residence" (Maryland) or to sales made "at or near your residence" (D.C.), since the rule more broadly defines definitely those sales which are "door-to-door" sales.

We are also aware that the retail instalment contract used by you is already at its practical maximum paper length and that the rule prescribes that the notice of cancellation be "attached to the contract* * *and easily detachable." In this connection, we have contacted Mr. William Dixon of the F.T.C., who supposedly is knowledgeable concerning the rule. Frankly, he hedged, but he did state that the notice of cancellation could not be contained on a separate paper, attached by paper clip or staple. He did concede, however, that if multiple forms are used, it "*might*" be acceptable to so prepare the form that the copy delivered to the buyer would contain the notice of cancellation form, even though the same was not contained on the first page of the form. This would entail a somewhat unusual set of forms, so that you would be delivering to the buyer *three* copies of the contract (to comply with all statutory requirements) and the original would, in

fact, be different from the other forms of the set. Frankly, we think this would be a poor practice, although possible, since the buyer's copies would be at variance with the original and could cause considerable dispute in the event of civil litigation. We have reviewed your forms and will be pleased to work with you to show you what can be done with the multiple form idea. However, based on a "guestimate," you will probably have less trouble and -uestion[sic] and probably not much more expense with forms which are supplied to the buyer (which under the rule must be in duplicate) containing the required notice of cancellation on a "tear off" perforated extension, which the form makers can probably fold in some manner so as to shorten the package. We will be pleased to work with you, by helping to design or reviewing any proposed forms. We do not think we can properly set out in this letter all of the necessary criteria for forms. In any event, we strongly urge that you keep your supply of new forms to a safe minimum, since it is likely that local jurisdictions and the F.T.C. will furnish us with better guidelines as the problems of compliance become better known and more acute.

We recognize that the foregoing does not satisfy your desire to comply with applicable law and the rule in a simple, straight-forward, manner. However, given the existing, very apparent, conflict of laws, we have had no choice but to make your task a bit more difficult than it really should be.

Sincerely yours,

/s/ Melville W. Feldman

Statistical reporting program on prices charged by members of a watchmakers association for various watch repairs. (File No. 753 7002)

Opinion Letter

May 22, 1975

Dear Mr. Neill:

This is in response to your letter of May 6, 1974 requesting an advisory opinion from the Commission concerning a proposed statistical reporting program.

It is the Commission's understanding that the Texas Watchmakers Association, Inc., an organization composed of twenty-one affiliated guilds, proposes to send each of its member watchmakers a copy of a survey questionnaire seeking an enumeration of retail charges for

watch repairs and parts. Data from the survey responses would be collated and average, high, and low prices computed for each item. In addition, the data might be broken down to reflect prices charged in different areas of the State of Texas. These aggregate figures would then be published in a trade journal.

The Commission cannot give its approval to the proposed survey. In the Commission's view, the exchange of price data may lend itself to price fixing and may result in the elimination of price competition. For example, if the published data were presented or regarded as establishing a suggested or recommended price range, it is the opinion of the Commission that such a suggestion or recommendation would be likely to constitute a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

Although the survey questionnaire is designed to elicit price information which is current as of the time the form is completed, it is doubtful that prices for watch repair services are so volatile that the information could not be used to stabilize future price levels. Furthermore, the Association's acknowledgment that the published data might be broken down by areas within the State of Texas causes the Commission concern, since particular guilds may be made up of a relatively small number of watchmakers. When the number of sellers in a geographic market is not numerous, an exchange of current price information among them is highly suspect under the antitrust laws. *See United States* v. *Container Corp. of America*, 393 U.S. 333 (1969).

The Commission does not mean to suggest that it will withhold its approval of all proposed statistical reporting programs involving the collection of price information. The legality of such a program hinges on its purpose, implementation, and effects. However, where a request for an advisory opinion regarding such a program is not accompanied by a showing of a legitimate interest which warrants the collection of price data, the Commission will decline to approve the program. In the present case, the Association has failed to address the question of what useful, lawful purpose would be served by the collection and dissemination of data relating to retail watch repair charges. As the Supreme Court said in the *Container Corporation* case, *supra*, at 393 U.S. 338, "Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."

By direction of the Commission.

Letter of Request

May 6, 1974

Gentlemen:

Please find enclosed a copy of the Texas Watchmakers Charter* along with a copy of a survey that we intend to mail to our members concerning the prices that they charge for watch repair.

It is our intent to gather this information and make it available through a trade journal and relate the average price, the high and low, and may break it down as to different areas of the State of Texas. Can we legally do this and not break any laws?

Thanks for your cooperation.

Yours truly,

/s/ Harold B. Neill
President

* For the reason that the copy furnished the compilers of this publication was illegible, as well as economy reasons, the charter is not reproduced here. However, it is available for inspection and copying at the Division of Legal & Public Records, Federal Trade Commission Building, Washington, D.C.

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TEXAS WATCHMAKERS ASSOCIATION, INC.
1974

RETAIL WATCH REPAIR CHARGES. IF YOU DO NOT SERVICE AND/OR REPAIR SOME TYPES OF WATCHES LISTED; PLEASE LEAVE BLANK. THE SIGNING OF THIS SURVEY IS OPTIONAL. RETURN IN ENCLOSED ENVELOPE.

Number I. through V. should be considered to have water-resistant cases.

I.	Regular stem-wind . . .	$______
	Date	______
	Date-Day	______
	Alarm	______
II.	Automatic	$______
	Date	______
	Date-Day	______
	Alarm	______
	Date-Day Alarm	______
III.	Regular Electronic . . .	$______
	Date	______
	Date-Day	______
IV.	Regular Electric	$______
	Date	______
	Date-Day	______
V.	Regular Accutron . . .	$______
	Date	______
	Date-Day	______
	Phasing only . .	______
VI.	Pocket; R.R. Quality .	$______
VII.	Chronograph, 30 min.	$______
	30 min. & hour . .	______
	Automatic	______
	Day-Date	______
VIII.	Antique-lever	$______
	Cylinder	______
	Duplex	______
	Fusee	______
IX.	High Grade Watches such as: Patek-Phillipe, Vacheror Constantine, & Audumars Piquet	$______
X.	Timer-stop watch 7 J .	$______
XI.	Install cell & check rate	
	Accutron	$______
	Electric	______
	Timex	______
	Electronic . . .	______

A = parts only, no other services rendered.
B = parts with complete service to watch.

	A	B
Regular stem	$______	$______
2-piece stem	______	______
Dress crown	______	______
Dust Proof Crown . .	______	______
Water-resistant crown	______	______
Skin-diver crown . . .	______	______
Regular stem and dress crown	______	______
Regular stem and water-resistant crown	______	______
Regular stem and Dustproof crown . . .	______	______
2-piece stem and water-resistant crown	______	______
Skin-diver crown and regular stem	______	______
Skin-diver crown and 2-piece stem	______	______
Balance staff	______	______
Mainspring	______	______
Dial refinishing, cost plus	______	______
Setting bridge	______	______
Detent	______	______
Winding pinion	______	______
Clutch	______	______
Clutch lever	______	______
Clutch lever springs .	______	______
Train wheels, cost plus what %	______	______
Other parts that do not require special fitting, cost of part plus what %	______	______
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Crystal w/ring	______	______
Crystal, glass	______	______
Crystal, fancy GS & SUC, & ETC.	______	______

GUARANTEE: I give a guarantee of ____ months on complete repair jobs.

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